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No. 90-1881

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANKLIN FEDERAL SAVINGS BANK, *et al.*,
Petitioners,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL MCGARRY III
Counsel of Record
THOMAS M. BUCHANAN
ERIC W. BLOOM
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Counsel for Petitioners

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Financial Institutions Reform, Recovery and Enforcement Act of 1989 abrogates an otherwise valid and binding contract between the plaintiff savings and loan association and the government.

PARTIES TO THE PROCEEDINGS BELOW

In addition to Franklin Federal Savings Bank, the following parties were plaintiffs-appellees in the court of appeals: Franklin Financial Group, Inc.; George O. Haggard, Jr.; Ben B. Jarnagin; Richard C. Jessee; A. Eugene Jolley; Jean S. Keener; George B. McGuffin; and Charles G. Robinette.

Defendants-appellants in the court of appeals were the Director, Office of Thrift Supervision, in his own capacity and as successor in interest to the Federal Home Loan Bank Board, and the Federal Deposit Insurance Corporation, in its own capacity and as successor in interest to the Federal Savings & Loan Insurance Corporation.

RULE 29.1 LISTING

Petitioner Franklin Federal Savings Bank is a wholly-owned subsidiary of petitioner Franklin Financial Group, Inc. The following are wholly-owned subsidiaries of Franklin Federal Savings Bank: Colonial Loan Association, Colonial Standard Title Company and Franklin Federal Insurance Group.

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PETITION FOR A WRIT OF CERTIORARI

Franklin Federal Savings Bank, et al.[1] respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Franklin Federal Savings Bank, et al. v. Director, Office of Thrift Supervision, et al.*, 927 F.2d 1332 (6th Cir. 1991).

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[1] Franklin Financial Group, Inc., George O. Haggard, Jr., Ben B. Jarnagin, Richard C. Jessee, A. Eugene Jolley, Jean S. Keener, George B. McGuffin, and Charles G. Robinette.

OPINIONS BELOW

The opinion of the court of appeals is reported at 927 F.2d 1332 and reproduced at Appendix ("App.") 1a. The order of the United States District Court for the Eastern District of Tennessee, issued on July 16, 1990, is reproduced at App. 28a.

JURISDICTION

The judgment of the court of appeals was rendered on March 12, 1991. No petitions for rehearing have been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves sections 301 and 401(g) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA" or "the Act"), Pub. L. No. 101-73, 103 Stat. 183 (codified at scattered sections of 12 U.S.C.), App. 34a.

STATEMENT OF THE CASE

A. Posture of the Case

Petitioners seek review of a judgment of the United States Court of Appeals for the Sixth Circuit that reversed a decision of the United States District Court for the Eastern District of Tennessee. The district court, finding that petitioners entered into a valid and binding contract with the government, and finding further that Congress expressly preserved the contract in the FIRREA, enjoined the respondent government agencies from taking any action inconsistent with their obligations under the contract. The Sixth Circuit reversed, concluding that, if petitioners had a contract with the government, the 1989 legislation abrogated it.

B. Nature of the Case

This action concerns a 1989 contract between Franklin Financial Group, Inc. ("Franklin Financial"), and two federal regulatory agencies, the Federal Savings and

Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB"). The terms of the deal were straight-forward. Franklin Financial, which is comprised of seven shareholders, contracted to acquire an ailing thrift—Morristown Federal Savings & Loan Association ("Morristown FS&LA"). Morristown FS&LA had lost, on average, approximately $230,000 annually in each of the previous five years, and had, at the time of the transaction, a total negative net worth of about $9.6 million. At the government's urgings, Franklin Financial agreed to assume all of Morristown FS&LA's assets and liabilities. In addition, the seven shareholders agreed to infuse $5 million of their *personal* funds into the troubled institution.[2]

The government, in consideration for Franklin Federal's agreement to assume the negative net worth of Morristown FS&LA, agreed to permit the new institution, renamed Franklin Federal Savings Bank ("Franklin Federal"), to treat its predecessor's deficit net worth—for regulatory capital purposes only—as an intangible asset, called "supervisory goodwill," which would be depreciated over 25 years. This contracted-for accounting treatment of supervisory goodwill was at the heart of Franklin Financial's agreement to take over the troubled thrift. Indeed, if Franklin Federal were not permitted to treat supervisory goodwill as an asset for regulatory capital purposes, Franklin Financial could not have gone through with the transaction because the institution would have been deemed in noncompliance with the capital requirements the moment the acquisition was consummated, leaving the institution vulnerable to an immediate government takeover.[3]

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[2] To obtain the $5 million in cash, the shareholders borrowed a significant amount from an unrelated commercial bank lender. The borrowing was secured by collateral belonging solely to the investors.

[3] The government's attempts to find buyers for troubled institutions were part of a broad policy to recapitalize troubled thrifts,

On August 9, 1989, eight months after Morristown FS&LA was converted to Franklin Federal, Congress passed the FIRREA. Since the enactment of the FIRREA, the Office of Thrift Supervision ("OTS"), the successor agency to the FHLBB, and the Federal Deposit Insurance Corporation ("FDIC"), the successor agency to the FSLIC, have declared Franklin Federal's contract ineffectual. OTS has forbidden Franklin Federal from fully including its supervisory goodwill as an intangible asset for purposes of meeting the regulatory capital requirements; has declared Franklin Federal undercapitalized; has directed Franklin Federal to file a capital plan that requires an additional infusion of cash; has forbidden Franklin Federal from paying dividends; and has threatened to appoint a conservator or receiver for the institution. Franklin Federal maintains that these actions constitute an unlawful breach of contract, and that OTS is acting in excess of its statutory authority.

C. The Statutory Scheme

Section 301 of the FIRREA[4] requires that the OTS Director promulgate final regulations that would establish new minimum capital standards for savings associations. The OTS regulations must require thrifts to satisfy three standards: a "tangible capital" requirement,

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and to provide the government a means by which it could avoid payment of millions of dollars to the insured depositors of the failing thrifts. To encourage the acquisition of troubled thrifts, and thus to minimize government pay-outs, defendants initially offered cash incentives to purchasing institutions. Respondents, however, soon recognized that this policy of providing cash contributions would quickly exhaust the insurance fund. Because respondents no longer could provide cash or other tangible financial incentives, respondents began encouraging supervisory mergers and acquisitions by promising other, less costly, forms of assistance, including the offer of supervisory goodwill as an asset for regulatory purposes. *See Olympic Federal Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1185 (D.D.C. 1990).

[4] Section 301 is reproduced at App. 34a.

a "core capital" requirement, and a "risk-based capital" requirement. Each of these terms is defined in the Act. 12 U.S.C. § 1464(t)(1)(a) (Supp. 1990). Of particular relevance here, the FIRREA provides that "tangible capital" shall not include supervisory goodwill, and that "core capital" may only include limited, and declining, amounts of supervisory goodwill. After January 1, 1995, supervisory goodwill may not be included at all in the core capital calculation.

Section 401(g),[5] however, appears to modify the scope of section 301. Section 401(g) provides that

> Subsection (a) [abolishing the FHLBB] shall not affect the validity of any right, duty or obligation of the United States, the [FHLBB], or any other person, which—
>
> (a) arises under or pursuant to the Federal Home Loan Bank Act, the Home Owner's Act of 1933, or any other provision of law applicable with respect to such Board (other than Title IV of the National Housing Act); and
>
> (b) existed on the day before the date of the enactment of this Act.

The issue before this Court is whether, as the government contends, section 301 abrogates plaintiffs' contract notwithstanding the language of section 401, or whether, as plaintiffs contend, section 401 preserves the parties' contractual rights, duties and obligations.

D. Disposition of Courts Below

On July 16, 1990, the district court, following testimony and argument, entered a permanent injunction enjoining the government from excluding supervisory goodwill from "any and all determinations" of Franklin Federal's capital calculations. The district court found that the parties' written contract expressly contemplated

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[5] Section 401(g) is reproduced at App. 34a.

that other documents would be incorporated thereto, *see* Order at ¶ 3, and that a "Forbearance Letter" issued in connection with the conversion "was an integral part of the entire agreement." *Id.* at ¶ 4. In the Forbearance Letter, the FHLBB and FSLIC agreed that the institution could treat the deficit net worth of Morristown FS&LA as an intangible asset, for regulatory purposes, and that this asset could be amortized over 25 years. The letter further provides that

> [o]*ther than* actions to enforce the regulatory requirements *waived* in accordance with paragraph 1 [authorizing amortization of goodwill] and the statutory provisions authorizing imposition of the *waived* requirement, . . .

the FHLBB and FSLIC retain all of their statutory rights and powers. Forbearance Letter at 1 (emphasis supplied); *see also* Order at ¶ 2. The district court concluded that, "absent the forbearance agreement," the shareholders of Franklin Financial "would not have invested an additional five million dollars" into the institution. Order at ¶ 5.

The district court made a specific finding that Franklin Federal is now "viable," that the institution has increased tangible capital in excess of seven million dollars since the acquisition, and that Franklin Federal is presently on course to meet the new capital standards required by Congress. Order at ¶ 6. "Thus it can be seen that the infusion of capital and the revitalized operation of the institution has inured to the benefit of the F.D.I.C. [Federal Deposit Insurance Corporation] and the American public to a total sum of over seven million dollars." *Id.* Finally, the district court found that, contrary to respondents' assertions, the FIRREA "does not abrogate the grant of this forbearance." Order at ¶ 7. The district court instead concluded that section 401(g) of the FIRREA expressly preserved the contract. Any other in-

terpretation would render section 401(g) "a mere nullity." *Id.*

The government appealed the district court's order to the United States Court of Appeals for the Sixth Circuit, arguing that the lower court erred by finding the case ripe for judicial review, that the Forbearance Letter constituted a contractual term, and that the parties' contract survived the enactment of the FIRREA. The court of appeals heard argument on November 16, 1990, and issued its decision on March 12, 1991.

The court of appeals first addressed the question of ripeness. A unanimous court agreed with the district court that the action was ripe against OTS, concluding that "the position of the OTS is sufficiently unequivocal to be considered final." 927 F.2d at 1337. A majority of the panel (with Judge Contie dissenting) nonetheless agreed with the government that Franklin Federal could not sustain its claim for injunctive relief against FDIC, finding that the agency had taken "no action that has had any effect whatsoever on the plaintiff." *Id.* at 1338.

The three judge panel then turned its attention to sections 301 and 401 of the FIRREA to determine the impact of the legislation on Franklin Federal's bargained-for right to treat supervisory goodwill as an asset for regulatory capital purposes. Without disturbing the lower court's findings with respect to the existence of a contract, the majority (with Judge Contie dissenting) concluded that, if there is a contract, that the "evidence of congressional intent is strong enough to infer that Congress wanted to effect a taking," and therefore, to abrogate Franklin Federal's contract. *Id.* at 1341. In reaching its decision the majority relied, in large part, on statements of individual members of Congress made during debates regarding a proposed amendment to the legislation, an amendment which was eventually defeated.

The majority further concluded that section 401 does not save Franklin Federal's contract, finding instead "that the plain language of the statute limits the reach of section 401(g)(1) to those obligations that could have been affected by virtue of the abolition of the FSLIC or the FHLBB. We find no support in the language for the notion that it was intended to limit the scope of the FIRREA's substantive provisions." *Id.* at 1339.

Judge Contie, the senior circuit judge on the panel, dissented. He found that Congress, if it intended to abrogate the instant contract, was obligated "to do so in unambiguous terms . . . ." *Id.* at 1341. He opined that "[n]either the courts nor the defendants are entitled to 'impute to Congress such a radical departure from established law in the absence of express congressional command.'" *Id.* at 1342, quoting *Feres v. United States*, 340 U.S. 135, 146 (1950). Judge Contie concluded that Congress, in the FIRREA, never expressed an intention, much less an unambiguous intention, to abrogate existing contracts. "[T]he government failed to identify any provision in FIRREA that *expressly* abrogates all conversion agreements; the government relies instead on strained inferences and select legislative history." *Id.* at 1341-42 (emphasis in original).

Not only does the FIRREA fail to abrogate contracts, but, Judge Contie concluded, Congress explicitly preserved all contractual relationships in section 401. "[S]ection 401(g)'s express language dictates that FIRREA not relieve the government of its existing legal duties and/or obligations." *Id.* at 1342. Judge Contie found that, if Congress intended to limit the scope of this section to preserve only those contracts pertaining to office space and supplies, as the government maintains, Congress "could have, and should have" so specified. *Id.* Congress, however, "well aware of conversion contracts," elected to draft the section in broad terms, thereby protecting *all* contracts of the former agencies. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE MAJORITY OF FEDERAL COURTS THAT HAVE ADDRESSED THE IDENTICAL QUESTION

This Court's resolution of the underlying issue would resolve a significant division in the courts below by delineating the scope of OTS's authority to abrogate contracts, contracts which have been relied upon by third parties to invest substantial amounts of money, and whose investments now could be eliminated overnight. Dozens of cases involving the identical issue are now slowly making their way through the federal courts. Most of the district courts that have faced the issue have found that the FIRREA preserves rather than abrogates previously existing contracts.

There are currently four cases docketed in various courts of appeals, with other cases sure to follow. *See Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 738 F. Supp. 1564, 1570 (D. Ore. 1990), *appeal docketed*, No 90-35752 (9th Cir. filed Sept. 19, 1990) ("In § 401(g) of FIRREA, Congress spoke to the precise question at issue. . . . [T]he inquiry should end and OTS should be directed to comply with congressional intent."); *Security Savings & Loan Association, et al. v. Director, Office of Thrift Supervision*, No. J 90-0486(L), slip op. at 17 (S.D. Miss. Feb. 21, 1991), *appeal docketed*, No. 91-1570 (5th Cir. filed May 24, 1991) ("This Court is in agreement with the conclusions reached by those courts which have held that Section 401(g) preserved and made binding upon OTS preexisting agreements of FSLIC and FHLBB to which those agencies were bound."); *Sterling Savings Association v. Ryan, Director, Office of Thrift Supervision*, 751 F. Supp. 871, 880 (E.D. Wash. 1990), *appeal docketed*, No. 91-35101 (9th Cir. filed Dec. 27, 1990) ("[H]aving found that Congress expressly preserved Sterling's contracts under Sec-

tion 401, at least from abrogation based on the discontinuation of the predecessor agencies, it would appear to be somewhat incongruous for Congress immediately to turn around and nullify those same agreements. That Congress would accomplish such a result by nothing more than mere innuendo, its intent disguised by a questionable inference, makes it all the more doubtful."); *Carteret Savings Bank v. Office of Thrift Supervision*, No. 91-661, slip op. at 38 (D.N.J. April 25, 1991), *appeal docketed*, No. 91-5290 (3d Cir. filed March 25, 1991) ("OTS' interpretation [of FIRREA] is unreasonable because Congress cannot and indeed, should not, abrogate a contractual right without clearly stating its intent to do so."). *See also Hansen Savings Bank, et al. v. Office of Thrift Supervision*, 758 F. Supp. 240, 246 (D.N.J. 1991). *But see Guaranty Financial Services, Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991), *rev'g*, 742 F. Supp. 1159 (M.D.Ga. 1990); *Century Federal Savings Bank v. United States*, 745 F. Supp. 1363 (N.D.Ill. 1990); *El Paso Savings Association v. Director, Office of Thrift Supervision*, No. EP-89-CA-426-H, slip op. (W.D.Tex. Jan. 8, 1990).[6] A number of other "goodwill" cases are currently pending in district courts throughout the United States. *See, e.g., Cenlar Federal Savings Bank, et al. v. Director, Office of Thrift Supervision, et al.*, No. 90-4782 (D.N.J. complaint filed Dec. 13, 1990) and *Charter Federal Savings Bank v. Director, Office of Thrift Supervision, et al.*, No. 91-0012 (W.D. Va. complaint filed Feb. 4, 1991). The government itself acknowledges at least thirty-four pending cases involving similar issues. *See*

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[6] Several courts have also denied relief on jurisdictional or ripeness grounds. *See Flagship Federal Savings Bank v. Wall*, 748 F. Supp. 742 (S.D.Cal. 1990); *Olympic Federal Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, No. 90-0482, slip op. (D.D.C. Sept. 6, 1990); *Saratoga Savings & Loan Association v. Wall*, No. 89-3305, slip op. (D.D.C. May 16, 1990); *First Federal Savings Bank & Trust v. Ryan*, 927 F.2d 1345 (6th Cir. 1991).

Attachment to Civil Appeal Information Statement in *Carteret*, No. 91-5290 (3d Cir. filed March 25, 1991).

Both the government and private litigants are expending tremendous resources litigating the issue presented in the instant petition. By granting the petition, and resolving the question, this Court can define the scope of OTS's authority, and the legal rights of savings and loan associations that have contracts with the government, and thus remove an ever-increasing number of related cases from the dockets of federal courts.

II. QUESTION PRESENTED IS OF SIGNIFICANT NATIONAL IMPORTANCE

This case presents an important question of federal law—whether OTS has the authority to abrogate contracts of, and seize billions of dollars of assets belonging to, thrifts that agreed to assume the liabilities and assets of troubled financial institutions. These contracts were generally consummated at the government's request, and almost always conferred significant benefits upon the government.[7] If, as petitioners submit, OTS's interpretation of the FIRREA is wrong, OTS already has unlawfully seized billions of dollars of assets, expended significant government funds to liquidate institutions that have proven records of profitability,[8] and scared away, unnecessarily, private investors and badly-needed capital from an industry in dire need of such capital.

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[7] In Franklin Federal's case, the government reaped a benefit in excess of $7 million. The shareholders of Franklin Financial infused $5 million of their personal funds into the institution, and the new management has restored the institution to profitability, earning about $2 million since the contract was consummated. Thus, if the institution were to be seized today, the cost of liquidation would be $7 million less than it was in January, 1989.

[8] *See, e.g., Suess, et al. v. United States*, No. 90-981C (Cl. Ct.) (Complaint filed Sept. 14, 1990, seeking recovery of damages for seizure of institution which had enjoyed *twelve* consecutive *profitable* quarters).

Indeed, only issues of war and peace have dominated the national agenda more than the "savings and loan crisis," which the current Administration has estimated could cost as much as $500 billion. Congress has wrestled with the crisis by holding months of hearings in which high officials of the Department of Treasury, the Office of the Comptroller of the Currency, the OTS and the FDIC have appeared to address the potential cost of the bailout, its impact on the economy, the availability of credit, as well as other relevant issues of national importance.

Petitioners, fully recognizing the depth of the current crisis, submit that they, far from being part of the problem, are instead part of the solution. In 1988, when the regulators were seeking new capital for Morristown FS&LA, the seven shareholders of Franklin Financial stepped forward and agreed to provide $5 million of their own capital to revitalize the troubled institution, and have since turned that institution into a profitable savings association. If Franklin Financial had not agreed to acquire Franklin Federal's predecessor, the government would have been compelled to shut the doors of a 55 year old institution at a cost to the American taxpayer of about $10 million.

But OTS's interpretation of the FIRREA has left Franklin Federal, and the other "white knights" of the industry, in an untenable position. After fully performing their contractual obligations, absorbing the significant negative net worth of failed institutions, and recapitalizing the failed institutions, Franklin Federal and other acquiring thrifts are faced with restrictions and threats of seizure.

The message has not been lost in the private sector. While everyone seems to recognize that "[p]rivate capital is the taxpayers' cushion . . . , ultimately reducing the bailout's cost to taxpayers," the regulators' unusual way of saying "thank you" to investors like Franklin Financial only serves to scare off potential new investors and much needed private capital. *See Wayne, Investors*

Decline Government Deals For Failed S.&L.'s, N.Y. Times, Nov. 14, 1990, at 1, col. 1. Investors, knowledgeable of the regulators' treatment of recapitalized thrifts, are weary of dealing with the government, recognizing that "the contract you negotiate could be upset if the political winds change." *Id.* Indeed, the government has found it "almost impossible to sell failed savings institutions to private investors," in part, because investors "do not trust the Government as a business partner." [9] *Id.*

The instant petition provides this Court an opportunity to determine whether Congress actually authorized OTS to abrogate contracts that were sought by the government to recapitalize a troubled industry.

III. THE COURT BELOW ERRONEOUSLY DECIDED THE ISSUE PRESENTED TO THIS COURT

A. Section 401(g) Expressly Preserves Franklin Federal's Contract

It has long been settled that an agency derives its authority to act from statute. Any agency action not so authorized must be set aside.

> It is basic that an administrative agency is a creature of statute, and can only act within the jurisdiction conferred by its enabling act. Although the courts will respect authorized agency action, an assumption of jurisdiction or action that is ultra vires and beyond the scope of the delegated authority will be set aside.

Dickenson, *Administrative Justice and Supremacy of Law* at 41 (1927). Here, OTS has acted outside the scope of its statutory authority as set forth in the FIRREA by unilaterally revoking petitioners' bargained-for treatment of supervisory goodwill.

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[9] The *New York Times* estimates that $2 billion in private capital could save taxpayers an estimated $20 billion. *Id.*

Nothing in the FIRREA allows OTS to abrogate existing agreements. To the contrary; the FIRREA expressly provides that all preexisting obligations and duties of the FSLIC and the FHLBB are not affected by the legislation. Section 401(g) states that "subsection (a) [abolishing FSLIC and the FHLBB] shall not affect the validity of any right, duty or obligation of the United States, the [FHLBB], or any other person, ..." Franklin Federal's contractual right to treat supervisory goodwill as an asset, which could be amortized over 25 years, falls squarely within those rights protected under section 401(g).

It is, of course, a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as *conclusive*.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981) (emphasis supplied), quoting *GTE Sylvania*, 447 U.S. at 108. Because, as shown below, there is no "clearly expressed legislative intent to the contrary," the words of section 401 must be given their full effect. *See also Rubin v. United States*, 449 U.S. 424, 430 (1981); *TVA v. Hill*, 437 U.S. 153, 187 n. 33 (1978).

While the district court, and petitioners, believe that the language of section 401 is unambiguous, and saves all contracts entered into by the FHLBB and the FSLIC, the majority of the Sixth Circuit panel disagreed. The majority, noting that section 401(g) preserves only "those obligations that could have been affected by virtue of the abolition of the FSLIC or the FHLBB," 927 F.2d at 1339, suggests that the obligations resulting from Franklin Federal's contract somehow do not fall into this category. But having entered into a binding agreement with the FSLIC and the FHLBB, the continuing validity of Frank-

lin Federal's contract would have been "affected" by the abolition of these agencies no differently than any other contract. As Judge Contie states in dissent:

> Though the government argues that section 401(g) protects only those rights, duties, and obligations endangered by the abolition of the FSLIC and the FHLBB, not by the enactment of FIRREA, the government's contention merely manipulates the express language of section 401(g). Section 401(g) preserves FSLIC's and FHLBB's pre-existing duties and obligations though the agencies no longer exist. Semantics notwithstanding, section 401(g)'s express language dictates that FIRREA not relieve the government of its existing legal duties and/or obligations.

Id. at 1342. This Court should give full effect to the words and meaning of section 401(g).

B. If Congress Intended to Abrogate Franklin Federal's Contract, It Was Required to State Its Intention in Express Terms

While petitioners believe that Congress unmistakably preserved Franklin Federal's contract in section 401(g) of the FIRREA, a determination by this Court or any court that the language is less than clear does not change the result. Indeed, the burden is not on petitioners to establish that Congress intended to preserve its contract; rather, the burden is on the government to establish that Congress unmistakably sought to abrogate petitioners' contract.

The court of appeals erred by discarding (without explanation) the fundamental principle of statutory construction that Congress must express its intention in clear, unambiguous and unmistakable terms when it seeks to upset settled expectations. Congress's failure to do so leaves the courts with no choice but to presume that Congress intended to preserve the status quo. "[L]egislation must be considered as addressed to the future, not to the

past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . *unless such be the 'unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'*" *Greene v. United States*, 376 U.S. 149, 160 (1964), quoting *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See also Feres v. United States*, 340 U.S. 135, 146 (1950) (emphasis added) (The court may not "impute to Congress . . . a radical departure from established law in the absence of *express* congressional command."); *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1953) ("[T]o convert this Act from a regulatory Act to one automatically abolishing preexisting . . . rights on a nationwide scale calls for a convincing explanation of that purpose."); *Bush v. Oceans International*, 621 F.2d 207, 211 (5th Cir. 1980) (emphasis added) ("The change in the status quo should not be inferred unless Congress has *unmistakably* indicated a wish to the contrary."); *Chester County Intermediate Unit v. Pa. Blue Shield*, 896 F.2d 808, 815 (3d Cir. 1990) ("[W]e cannot conclude, without clear statutory support, that Congress intended the [statute] to abrogate such a provision in a privately negotiated contract. We are confident that Congress would not have done so without explicitly so providing."); *United States v. Taylor*, 487 U.S. 326, 345-46 (1988) (Scalia, J., dissenting) ("It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes law, the people must obey."); *Sterling Savings Association*, 751 F. Supp. at 881 ("Without some sort of clear statutory mandate, the court will not lightly infer that Congress has undertaken to abrogate the contractual rights of private citizens."); *Franklin Federal*, 927 F.2d at 1341 (Contie, J., dissenting) ("When

Congress intends to upset previously settled expectations, it is obligated to do so in unambiguous terms.").

Thus, even assuming that Congress intended to abrogate goodwill contracts like that of Franklin Federal, it was obligated to state its intention clearly in the statutory language. The court of appeals, therefore, erred by "infer[ring]" from the FIRREA and its legislative history a congressional intent to terminate previously existing agreements. *See* 927 F.2d at 1341. Consequently, as two district courts have found when confronted with the precise issue before this Court,

> even assuming the defendants are correct in their assertion that Congress harbored an intent to abrogate binding and enforceable contracts, as it has power to do, the Court must insist that it be evidenced in a forthright and unmistakable manner. Absent a clear mandate to the contrary, the court will require the defendants to honor the contracts entered into between [plaintiff] and the predecessor agencies.

Security Savings, slip op. at 17, quoting *Sterling*, 751 F. Supp. at 881.

Instead of requiring Congress to state its intention to abrogate supervisory goodwill contracts in unmistakable terms, as this Court mandates, the majority in *Franklin Federal* scoured the legislative history of the statute looking for signs that could assist the court in its determination.

In any event, the legislative history upon which the court relied consisted of nothing more than remarks from individual legislators concerning a defeated amendment, the Hyde Amendment. *See* App. 16a-17a. "[T]he language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action." *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984), citing

73 Am.Jur.2d *Statutes* § 171 (1974).[10] This legislative history hardly reverses the heavy presumption that legislation is "addressed to the future, not to the past . . ." *See Greene v. United States*, 376 U.S. at 160. Nor does the cited legislative history reveal "the unequivocal and inflexible import of" the statute. *Id., quoting Union Pacific*, 231 U.S. at 199. After all, no more than a few dozen congressmen addressed the Hyde Amendment on the record. Nor is there any evidence in the record that either the Senate or the President considered the impact of the defeated amendment on the implementation of the statute.

Courts, when looking to the legislative history of a statute, must look no further than Conference Reports or Committee Reports. As the Chief Justice wrote for the majority in *Garcia v. United States*, 469 U.S. 70, 76 (1984) (some citations omitted):

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 324,

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[10] This is especially so when the defeated legislation—here, the "Hyde Amendment"—does not address the precise issue being litigated. The amendment, far from preserving or abrogating savings associations' contracts, merely called for the establishment of an administrative procedure to review "substantial contract claims." Indeed, the Hyde Amendment was defeated, in part, because of general opposition to the proposed administrative procedures. Rep. Gonzales "strongly oppos[ed] the Hyde Amendment [because it would] provide[] for a lengthy and disruptive administrative appeals process that will have the effect of nullifying the improvements and regulation this bill requires." 135 Cong. Rec. H 2705. Rep. Pelosi similarly expressed her fear that passage of the Hyde Amendment "would allow [savings associations] to stall by implementing a complex procedure through which they could tie the regulators' hands." *Id.* at H 2711.

> 24 L.Ed.2d 345 (1969). We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates. In [United States v. O'Brien, 391 U.S. 367, 385 (1968)] we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in *Zuber* [396 U.S. at 187].

Or as Justice Jackson stated in his concurring opinion in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951):

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.

Justice Jackson continues,

> [I]t is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Id. at 396.[11]

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[11] This Court has even expressed reservations about relying on Committee Reports. *See Blanchard v. Bergeron*, 489 U.S. 87, 89 (1989) (Scalia, J., concurring) ("It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."); *Gooding v. United States*, 416 U.S. 430, 468 (1974) (Marshall, J., dissenting) ("It is the language of the statute, as enacted by the Congress, that is the law of the land, not the language of a committee report which may or

In short, because the government can point to no provision in the FIRREA that expressly abrogates the terms of Franklin Federal's contract, and because the government can point to no Conference Report or Committee Report that reflects the "unequivocal and inflexible" wish of Congress to abrogate contracts,[12] Franklin Federal's contract remains in full force and effect.

C. The Proper Application of the *Chevron* Test Requires Reversal of the Court of Appeals' Decision

In *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court enunciated a two-prong test for courts to follow when reviewing an agency's construction of a statute that it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously-expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of a statute.

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may not represent accurately the views of the hundreds of other legislators who voted for the bill.").

[12] The court of appeals found that the full report of the House Committee on Banking, Finance and Urban Affairs, *see* H. Rep. No. 54(I), 101st Cong. Sess., *reprinted in* U.S. Code Cong. & Adm. News 86 (1989), is "*silent* on the issue," and that the "views of various representatives," as expressed in a separate section of the report, were "contradictory" and "unenlightening." 927 F.2d at 1340 (emphasis supplied).

Id. at 842-843 (footnotes omitted). Petitioners submit that, under either prong of the *Chevron* test, Franklin Fereral's contract survives the FIRREA.[13]

Section 401(g), on its face, clearly preserves those rights, duties and obligations of all the parties to this action that existed "on the day before the date of the enactment of" the FIRREA. Many courts have found this paragraph determinative of the issue. *See Far West*, 738 F. Supp. at 1570 ("In § 401(g) of FIRREA, Congress spoke to the precise question at issue."); *see also Sterling*, 751 F. Supp. at 881 ("As this Court reads FIRREA, Congress has honored the promises made to [plaintiff]. It is the regulators who, in their zeal for

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[13] This Court's decision in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987), seems to cast doubt on the application of *Chevron* to the instant action. In *Cardoza-Fonseca*, the Court suggested that, where there is "a pure question of statutory construction," the issue is "for the courts to decide," notwithstanding the traditional deference usually accorded to agencies' interpretations. *See, e.g., International Union, United Auto., Aerospace and Agric. Implement Workers of America v. Brock*, 816 F.2d 761, 765 n. 5 (D.C. Cir. 1987), *quoting Cardoza-Fonseca*, 480 U.S. at 446 (finding that *Cardoza-Fonseca* "strongly indicates that the interpretation of a statutory provision remains 'a pure question of statutory construction for the courts to decide' even when the provision at issue admits of some ambiguity."). Indeed, deference in the instant circumstances makes little sense. To defer to an agency on the question of whether it must abide by its own contractual obligations places the agency in an untenable conflict of interest. On the one hand, it has an affirmative obligation to interpret the law as it is written, consistent with long-standing fundamental principles of statutory construction; on the other hand, it has a very real monetary interest in the specific construction of the statute. *But see National Labor Relations Board v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 133 (1987) (Scalia, J., concurring) ("[O]ur decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*[.] Some courts have mistakenly concluded otherwise, on the basis of dicta in *INS v. Cardoza-Fonseca*.").

nonnegotiable uniformity, have discovered a contrary intent that this Court finds is not clear from the statutory language."); *Franklin Federal*, 927 F.2d at 1342 (Contie, J., dissenting) (finding that OTS's interpretation of the FIRREA "manipulates the express language of section 401(g).").

Even assuming *arguendo* that the language of section 401(g) were ambiguous, the agency's construction must be deemed impermissible, and should be rejected, because it assumes that Congress intended to abrogate long-standing agreements without expressing its intent in unmistakable terms, as this Court mandates. *See* cases cited in Part III.B.; *see also Carteret*, slip op. at 37-38 ("[T]his Court determines that OTS' interpretation is unreasonable because Congress cannot and indeed, should not, abrogate a contractual right without clearly stating its intent to do so. Secondly, it is clearly not one of the purposes of FIRREA to permit the agency to make an otherwise healthy institution submit to its sanctions, thus jeopardizing the ability of that institution to thrive and serve the community. An interpretation which does so is patently unreasonable."); *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 738 F. Supp. 1559, 1564 (D. Ore. 1990) (finding that "Congress could not have intended a result so unjust and inequitable as the complete abrogation of a long-term comprehensive agreement on which private third parties rely to invest large sums of money. To abrogate such an agreement would practically guarantee that potential investors would look elsewhere."). Indeed, in the absence of express statutory language, OTS is prohibited from inferring a congressional intent that would render otherwise valid and binding contracts null and void.

CONCLUSION

For the reasons stated herein, a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be issued and the case set for plenary review.

Respectfully submitted,

J. MICHAEL MCGARRY III
Counsel of Record
THOMAS M. BUCHANAN
ERIC W. BLOOM
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Counsel for Petitioners

June 7, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 90-5971

FRANKLIN FEDERAL SAVINGS BANK; FRANKLIN FINANCIAL GROUP, INC.; GEORGE O. HAGGARD, JR.; BEN B. JARNAGIN; RICHARD C. JESSEE; A. EUGENE JOLLEY; JEAN S. KEENER; GEORGE M. MCGUFFIN; CHARLES G. ROBINETTE,

Plaintiffs-Appellees,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, in his own official capacity and as successor in interest to the Federal Home Loan Bank Board; and the FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to the Federal Savings and Loan Insurance Corporation,

Defendants-Appellants.

Argued Nov. 16, 1990

Decided March 12, 1991

John F. Dugger, Bacon, Dugger, Jessee & Perkins, Morristown, Tenn., Thomas Buchanan, J. Michael McGarry, III (argued), William D. Coston, Eric W. Bloom, Bishop, Cook, Purcell & Reynolds, Washington, D.C., for plaintiffs-appellees.

Aaron B. Kahn, Harris Weinstein, Thomas J. Segal, Office of the Dept. of Treasury, Thrift Supervision, Jacob M. Lewis (argued), U.S. Dept. of Justice, Douglas Letter, Dept. of Justice, Appellate Staff, Civ. Div., Martin Jefferson Davis, Office of Thrift Supervision, Washington, D.C., John W. Gill, Jr., U.S. Atty., Marilyn L. Hudson, Asst. U.S. Atty, Knoxville, Tenn., Thomas A. Schulz, Dina L. Biblin, Federal Deposit Ins. Corp., Theodore C. Hirt, U.S. Dept. of Justice, Appellate Staff, Civ. Div., Stuart M. Gerson, Leslie H. Southwick, Brook Hedge, Gary W. Herschman, Dept. of Justice, Civ. Div., Washington, D.C., for defendants-appellants.

Before KEITH and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

BOGGS, Circuit Judge.

Franklin Federal Savings Bank sees itself as a good institution on the rebound being hounded by federal regulators who refuse to keep their word. Franklin's predecessor, Morristown Federal Savings and Loan Association, began operating in 1935. In the 1980s, Morristown Federal Savings and Loan Association began having financial problems. Still, seven shareholders—all plaintiffs in this case—did believe that they could restructure the bank and solve its problems. Accordingly, they formed the Franklin Financial Group, a holding company that would take over Morristown, change its name to "Franklin Federal Savings Bank," and inject new capital. The Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") approved these changes.

Franklin thinks that, given time, the bank can regain its financial strength. When Franklin made its deal with the FSLIC and the FHLBB, the parties reached an agreement governing the accounting treatment of the bank for regulatory purposes. At least, Franklin thinks it had a deal. The Office of Thrift Supervision (successor to the

FSLIC and the FHLBB) claims that any agreement by the FSLIC or the FHLBB regarding the accounting treatment to be applied to Franklin for the purpose of meeting its regulatory requirements constitutes a nonbinding statement of regulatory intent. This difference in views is important because, in the meantime, Congress passed FIRREA—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. FIRREA requires savings and loans to meet a whole host of new regulatory capital requirements. The OTS believes that FIRREA abolished all prior regulatory forbearances. Franklin thinks otherwise. These two issues—the nature of the understanding between Franklin and the FHLBB and the effect of FIRREA—are the crux of contention in this case. Franklin has received a permanent injunction preventing the OTS from applying new regulatory requirements to it. The OTS appeals, and we now reverse.

I

Franklin's precedessor savings and loan began to have financial problems in the early 1980s. From 1983 to 1988, Morristown's losses averaged $230,000 a year. According to Franklin, these losses resulted from its having outstanding a number of relatively low-yield loans while, at the same time, it had to compete for depositors in a deregulated environment by paying higher interest. At oral argument, Franklin assiduously denied that its troubles resulted from speculative loans or mismanagement. Nonetheless, the officers of Morristown realized that something had to change if the bank was to survive. As early as 1984, the officers of Morristown, together with officials from the FSLIC and the FHLBB, began formulating a plan. Under the plan, Morristown would convert from the mutual to the stock form of organization and a holding company would acquire the troubled thrift, injecting needed capital.

As a result of these negotiations, a group of investors formed the Franklin Financial Group, Inc. for the pur-

pose of acquiring Morristown. The investors who formed the Franklin Financial Group included a number of Morristown managers and directors, including Charles Robinette, who had, in March 1988, taken over as Chief Executive Officer of Morristown. In due course, the management of Morristown and the Franklin Financial Group submitted their proposal to the FSLIC and the FHLBB, the agencies that were required to approve such changes. Under the plan as submitted, Morristown would undergo a so-called "voluntary supervisory conversion" from the mutual form to the stock form. After the conversion, Franklin Financial would then acquire Morristown, which would operate henceforth as "Franklin Federal Savings Bank."

The FSLIC and the FHLBB approved the transaction. In the acquisition of Morristown, the Franklin Financial Group "acquired" so-called "supervisory goodwill" in an amount equal to Morristown's net liability. Supervisory goodwill is an accounting construct used in certain types of transactions. When a business, such as a savings and loan, is purchased, and its liabilities exceed assets, the shortfall is carried on the books of the new institution as an asset—"supervisory goodwill." This "asset" is then written off—amortized—over a period of years, and is eventually no longer carried on the books.

The acquisition and supervisory conversion of Morristown required the approval of both the FSLIC and the FHLBB. Though the parties differ as to who it was that initiated the transaction, the FSLIC and the FHLBB clearly approved of and cooperated in the deal. On January 12, 1989, the Franklin Financial Group entered into a Voting and Disposition Rights Dividend Agreement with the FSLIC that spelled out the terms under which the Franklin Financial Group could acquire Morristown Federal Savings and Loan Association. Section VIII(D) states:

> All references to regulations of the Board or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that *subsequent amendments to such regulation may be made and* that such amendments *may increase* or decrease *Acquiror's obligation under this Agreement.*

(emphasis added). Previously, the FHLBB had sent Franklin a forbearance letter dated November 21, 1988. This letter reads, in part:

> In connection with the approval by the Federal Home Loan Bank Board ("Board") of the Voluntary Supervisory Conversion and acquisition of Morristown Federal Savings and Loan Association . . . the following forbearance is hereby granted.
>
> 1. For purposes of reporting to the Board, the value of any unidentifiable intangible assets resulting from accounting for the acquisition in accordance with the purchase method may be amortized by Franklin Federal Savings Bank over a period not to exceed 25 years by the straight line method.

Franklin argues that this forbearance constitutes a binding part of its agreement with the FHLBB and the FSLIC. The FHLBB argues that the forbearance was merely a statement of regulatory intent rather than a binding contractual obligation on the part of the government.

Though the transaction was intended to benefit the Franklin Financial Group's investors, it did save the FSLIC a certain amount as well. While Morristown had not yet been placed into receivership, everyone agrees that Morristown was a troubled institution. Moreover, the transaction was not without cost to the shareholders of the Franklin Financial Group either. At the time of the transaction, Morristown's liabilities exceeded its as-

sets by $9.6 million. The FHLBB and the FSLIC believed that the Franklin Financial Group would have to contribute at least $3 million to make Franklin Federal a viable institution. Ultimately, the Franklin Financial Group invested $5 million in Franklin Federal. Evidently confident that Franklin Federal would succeed, the shareholders in the Franklin Financial Group borrowed the $5 million—securing the debt with their own collateral, not Franklin Federal's, and agreeing to be personally liable for the full amount. Franklin Federal has enjoyed a certain amount of success. In the 1989 calendar year, it earned $1.2 million. With the infusion of new capital, together with the modest success, Franklin's negative tangible capital has shrunk from approximately $9.6 million to $2.184 million as of July 1990.

The OTS claims that the forbearance letter does not bind it. The OTS argues that the forbearance letter merely constituted a "statement of regulatory intent" rather than a contractual obligation. Franklin notes that it received no assistance from the FSLIC other than the regulatory forbearance allowing its use of supervisory goodwill. Franklin says it never would have entered into the arrangement if it had not believed that the forbearance was binding on the government.

In 1989, Congress passed FIRREA. FIRREA sharply curtailed the use of supervisory goodwill in order to meet regulatory capital requirements in the thrift industry. Supervisory goodwill can now be amortized over no more than twenty years. 12 U.S.C. § 1464(t)(9)(B). As the forbearance letter allows Franklin to amortize supervisory goodwill over a twenty-five year period, the statute cuts off five years.

In addition, the use of supervisory goodwill is being phased out in calculating "core capital," an accounting category that now must amount to no less than three percent of the institution's total asset base. 12 U.S.C.

§ 1464(t)(2)(A). By January 1, 1995, supervisory goodwill cannot be used at all to calculate core capital. 12 U.S.C. § 1464(t)(3)(A).

Franklin Federal asked the district court for an injunction forbidding either the FDIC or the OTS from applying the new regulatory changes to it. The district court entered a temporary restraining order against the OTS and the FDIC after an *ex parte* hearing. After doing so, the judge held a hearing for a preliminary injunction, which was collapsed into a hearing on a permanent injunction pursuant to Fed.R.Civ.P. 65(a)(2). After hearing evidence, the district court granted Franklin Federal's motion for a permanent injunction. The injunction prohibited either the FDIC or the OTS from "excluding the amortization of supervisory goodwill from any and all determination of the plaintiff institution's capitalization as set out in the [forbearance letter]." The district court did not indicate whether its injunction prevented limitations on the uses of supervisory goodwill other than the limitation on the time for amortization, such as the limitations on its use to meet core capital requirements.

II

We decide this case together with a companion case involving similar issues, *First Federal Savings Bank v. Ryan*, 90-1785, 927 F.2d 1345 (6th Cir.1991). In *First Federal*, we held that the plaintiff institution's claim for an injunction against the OTS prohibiting the OTS from appointing a conservator or receiver was not ripe for review. This case arises in a somewhat different posture. Here, the plaintiff institution has asked for and received an injunction against the application of certain rules. In *First Federal*, by contrast, the plaintiff institution asked for (but did not receive) an injunction preventing the OTS from taking a particular action—appointing a conservator or receiver—in accordance with applicable statutes and regulations. Though we think that this is a

close case, we conclude that Franklin's claim, unlike First Federal's, is ripe for review.

In order to determine whether a claim is ripe for review, we must apply a two-part test. "Courts must first 'determine whether the issues tendered are appropriate for judicial resolution,' and then 'assess the hardship to the parties if judicial relief is denied at that stage.'" *Young v. Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981), quoting *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162, 87 S.Ct. 1520, 1523, 18 L.Ed.2d 697 (1967). In order to be ripe for review, a dispute must satisfy both prongs of the ripeness test. *Production Credit Association v. Farm Credit Administration*, 846 F.2d 373, 375 (6th Cir. 1988).

We begin, then, with the question of whether the issues are appropriate for judicial resolution. The Supreme Court, in what may be the seminal ripeness case, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), analyzed whether the issues in that case were appropriate for judicial resolution by applying several factors, which we consider *seriatim*.

The Supreme Court began with the fact that the issue before it in that case was purely legal. *Id.* at 149, 87 S.Ct. at 1515. In *First Federal*, we held that the issue presented there was *not* purely legal because determining whether the situation required the OTS to appoint a conservator or receiver would depend on numerous factual determinations, all of which might be subject to change. While there are some factual determinations that are relevant to this case, the issues are, for the most part, purely legal. All agree that FIRREA contradicts the express undertaking of the FHLBB in its forbearance letter. The question for us is whether the forbearance letter is a contract binding on the OTS and, what effect, if any, FIRREA had on that contract. To the extent that factual issues are relevant, all of the important events have already transpired. Moreover, in this case,

as in *Abbott Laboratories*, "both sides have approached this case as one purely of congressional intent." *Id.* at 149, 87 S.Ct. at 1516.

The second factor analyzed by the Supreme Court is much closer: whether the regulations at issue constitute "final agency action" as defined by the Administrative Procedure Act. *Ibid.* As the Supreme Court explained in *Abbott Laboratories*, the "cases dealing with judicial review of administrative actions have interpreted the 'finality' requirement in a pragmatic way." *Ibid.* While the OTS has not taken any action directly regarding the bank, such as appointing a conservator or receiver, the OTS has made a reasonably clear statement of its position. In Thrift Bulletin 38-2, the OTS took the position that it would apply the new capital standards to all savings and loans—even those that had previously been granted forbearances.

As a general rule, final agency action includes "interpretive decisions that crystalize or modify private legal rights." *Federal Trade Commission v. Standard Oil of California*, 449 U.S. 232, 247, 101 S.Ct. 488, 497, 66 L.Ed.2d 416 (1980) (Stevens, J., concurring). The D.C. Circuit has explained the purpose of the finality requirement as being to determine "if the agency's position is merely tentative or, on the other hand, whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position." *Ciba-Geigy Corporation v. U.S. Environmental Protection Agency*, 801 F.2d 430, 436 (D.C.Cir.1986). While an agency may generally express tentative views without judicial review, "[o]nce the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ibid.*

The OTS maintains that Thrift Bulletin 38-2 is not a final agency action. We believe, however, that its posi-

tion on this issue contradicts its other arguments. On the strength of its stated position in Thrift Bulletin 38-2, the OTS demands, on the merits, the deference due it under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We owe deference to an agency because the agency presumably has applied its particular specialized expertise to a problem. Thus, for example, we do not defer to positions taken by the agency in the course of litigation, as these positions are generally dictated by agency lawyers, not by those with the specialized expertise upon which courts legitimately rely. *Investment Company Institute v. Camp*, 401 U.S. 617, 628, 91 S.Ct. 1091, 1097-98, 28 L.Ed.2d 367 (1971) ("It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress."). When an agency has acted so definitely that its actions are defended based on *Chevron*, we believe that its action should be treated as final. *See, e.g., Ciba-Geigy*, 801 F.2d at 437 ("We can divine no reason why the letter from the head of the EPA's Pesticide Division, speakding [sic] for the agency charged with administering FIFRA, would not be entitled to deference from the least dangerous branch.").

Accordingly, we are convinced that the position of the OTS is sufficiently unequivocal to be considered final. As in *Ciba-Geigy*, the agency's position is unambiguously stated and given without any indication that it might be subject to further modification or factual considerations that would affect the position of the OTS. *Id.* at 437. The OTS seems to have made up its mind.

Nor do we believe that review at this point would undermine the regulatory scheme. In *First Federal*, we decided that review would undermine the regulatory scheme because the statute gave the Director the sole discretion to appoint a conservator or receiver, with ju-

dicial review to come after appointment. Here, by contrast, we conclude that judicial interpretation would probably enhance rather than undermine the statutory scheme. We can see no factual contingencies that would affect the actions of the OTS, and an authoritative interpretation of statutory language will enable the OTS to be even more efficient in its implementation of the statutory scheme.

We turn now to the second prong of the ripeness inquiry: the hardship resulting from failure to provide judicial review. The focus of the hardship inquiry is on whether an agency position would affect the "primary conduct" of the party seeking judicial review. *Toilet Goods Association v. Gardner*, 387 U.S. 158, 163, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967). It is the position of the OTS that all financial institutions that received regulatory forbearances are bound by the new rules. The OTS does point out that it has the authority to grant exemptions from "almost all" of the sanctions resulting from failure to meet capital requirements. 12 U.S.C. § 1464(t)(7). "Almost all" is not "all." Even if the OTS were to grant Franklin an exemption to the full extent of its authority, Franklin would still be constrained by the limits on asset growth, which the Director is not authorized to waive. 12 U.S.C. § 1464(t)(6) & (7). Moreover, Franklin's ability to pay dividends to its shareholders depends on the strength of its balance sheet. Thus, while the harm to Franklin Federal is not as compelling as the harsh civil or even criminal penalties faced by the company in *Abbott Laboratories*, 387 U.S. at 152, 87 S.Ct. at 1517, we nonetheless believe that it is adequate to support judicial review.

While we conclude that the suit against the OTS is sufficiently ripe, the claim against the FDIC is a different story. The FDIC has, so far as we can tell, taken no action that has had any effect whatsoever on the plaintiff. The only thing that the FDIC might be able to do to Franklin would be to revoke its insurance coverage. If

it were to do that, however, Franklin would be entitled to an adversary hearing prior to the termination of its insurance. 12 U.S.C. § 1818(a)(2) & (3). That determination would then be subject to appellate review in accordance with the provisions of the Administrative Procedure Act. 12 U.S.C. § 1818(h)(2). Thus, we conclude that the claim against the FDIC is not ripe for review.

III

We begin our analysis of the merits of the district court's decision to grant the injunction by looking at the meaning of FIRREA. There is no question that the substantive provisions of FIRREA contradict the express terms of the forbearance letter of November 21, 1988. The most glaring contradiction is that the forbearance letter allows the amortization of supervisory goodwill over a twenty-five year period, while 12 U.S.C. § 1464 (t)(9)(B) requires amortization within twenty years. Although some might argue that the limitations on the use of supervisory goodwill to meet core capital requirements contradict the provisions of the forbearance letter as well, Franklin does not make this argument, conceding in its brief that it is bound by those provisions.

Nonetheless, Franklin adamantly maintains that it has the right to treat supervisory goodwill as an asset that can be amortized over twenty-five, not twenty, years. Franklin argues that Section 401(g) of FIRREA preserves the FHLBB forbearance. Section 401(g) reads, in relevant part:

> (1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.—
>
> Subsection (a) [eliminating the FSLIC and the FHLBB] shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan Bank Board, or any other person, which—

> (A) arises under or pursuant to the Federal Home Loan Bank Act, the Home Owner's Loan Act of 1933, or any other provision of law with respect to such Board (other than title IV of the National Housing Act); and
>
> (B) existed on the day before the date of the enactment of this Act.

FIRREA, Pub.L. No. 101-73, § 401(g), 103 Stat. 183, 356 (1989). The dispute between Franklin and the OTS centers on this provision.

Franklin interprets this language to provide a saving provision for any bargained-for regulatory forbearances that constituted a part of any contract between a financial institution and the FHLBB. Franklin stresses the word "any," as in the phrase "*any* right, duty, or obligation." (emphasis added) It argues that, as its forbearance agreement was a contract between it and the FHLBB, it would fall within the Act's language saving "any right, duty, or obligation." According to Franklin, Congress knew that there were contracts to which the FHLBB was a party and acted explicitly in § 401(g)(1) to save such agreements. Franklin maintains that, if the language of this provision was *not* meant to include forbearance agreements, then Congress should have added the phrase "except forbearance agreements that contradict the substantive provisions of this Act," or similar language.

The OTS offers a much narrower interpretation of this language. Section 401(g)(1) begins "[*s*]*ubsection (a)* shall not affect the validity of any right, duty, or obligation. . . ." (emphasis added). The OTS maintains that only those obligations that might possibly have been affected by subsection (a) are included in the scope of the saving clause. Subsection (a) merely abolishes the FSLIC and the FHLBB. FIRREA, Pub.L. No. 101-73, § 401(a), 103 Stat. 183, 354 (1989). Thus, according to the OTS, § 401(g)(1) is merely intended to save those obligations

that might have inadvertently been eliminated by the abolition of the FSLIC and the FHLBB—and only those provisions.

We believe that the language of the statute supports the OTS's interpretation. Section 401(g)(1) explicitly states that "[s]ubsection (a) shall not affect the validity of any right, duty, or obligation of the . . . Federal Home Loan Bank Board. . . ." The provision does not, by its terms, speak to the effect that other sections of FIRREA might have on the rights, duties, or obligations of the FHLBB. We conclude that the plain language of the statute limits the reach of section 401(g)(1) to those obligations that could have been affected by virtue of the abolition of the FSLIC or the FHLBB. We find no support in the language for the notion that it was intended to limit the scope of FIRREA's substantive provisions. In essence, the provision is intended to assure that the OTS remained in privity with the FSLIC and the FHLBB, not to exempt banks with forbearance agreements from the substantitve provisions of FIRREA.

Our conclusion that Section 401(g)(1) saves only those obligations that could have been affected by the elimination of the FHLBB's corporate existence, is, moreover, strengthened by an analysis of nearby provisions. When analyzing the meaning of a particular provision, we can also look at the statutory framework in which the provision is embedded. *See Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corporation*, 489 U.S. 561, 573-75, 109 S.Ct. 1361, 1369, 103 L.Ed.2d 602 (1989). Section 401(g)(2) allows for the continuation of lawsuits to which the FHLBB is a party after its abolition. Section 401(b) addresses the disposition of affairs during the period of transition when the OTS was just starting up; section 401(c) provides for the authority and status of the Chairman of the FHLBB. Section 401(f) is a saving provision paralleling section 401(g) that applies to the FSLIC rather than the FHLBB.

Both sides find comfort in the extensive legislative history of FIRREA. The OTS points to some portions of the legislative history in which some legislators express the view that abrogating the provisions of forbearance agreements allowing the amortization of supervisory goodwill would be a good idea, while Franklin points to other portions of the legislative history in which some legislators suggest that retaining such provisions would be a good idea. Both sides miss the point of looking to the legislative history.

Analyzing legislative history is valuable only to the extent that it tells us something about the meaning of the text. "Words do not have meanings given by natural law. . . . [S]uccessful communication depends on meanings shared by interpretive communities." *Continental Can Company, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir.1990). Legislative history is, in other words, "a clue to the meaning of the text" because it gives us some idea of the shared understanding of Congress. *Id.* at 1158.

Thus, we find the views of various representatives about the *desirability* of certain policies to be unenlightening in ascertaining the *meaning* of the statutory text. In the report of the Committee on Banking, Finance, and Urban Affairs, we find the "additional views" of two different groups of representatives stating opposing views regarding the meaning of the legislation before the House. One group stated that "forbearances are binding and enforceable. . . . [T]he government has the moral and legal obligation to stand behind every element of these agreements." H.Rep. No. 54, 101st Cong., 1st Sess. pt. 1 at 535 *reprinted in* 1989 U.S.Code Cong. & Admin.News 87, 328 (additional views of Reps. Hiler, Ridge, Bartlett, Dreier, McCandless, Saiki, Baker, and Paxon). While these views might seem to support Franklin's position, it is not at all clear to us from the context in which these

statements appear that these representatives referred explicitly to the problem of supervisory goodwill. Even if they did, however, there are statements evincing a contradictory understanding earlier in the same report. Three other Representatives suggested that "[t]he committee's action is the same as the government asking a man to enlist in the Army for hazardous duty overseas and then suing him for deserting his wife and children." *Id.* at 497, *reprinted in* 1989 U.S.Code Cong. & Admin.News, 87, 292 (additional views of Reps. Annunzio, Kanjorski and Flake). While these two groups of Representatives evidently agreed that FIRREA ought to preserve forbearance agreements, they obviously differed with each other regarding the meaning of the statute. The full committee report is silent on the issue.

More persuasive than these views is the debate that took place regarding an amendment sponsored by Representative Hyde that would have given institutions such as Franklin an administrative hearing on their contract claims. 135 Cong.Rec. H2703 (daily ed. June 15, 1989). The amendment addressed exactly the sort of assisted transaction involved in this case and in *First Federal.* Members spoke vigorously on both sides of the Hyde Amendment. Representative Gonzalez opposed the amendment on the grounds that Congress had the right to change the rules and that the legislature had the responsibility to "ensure that this hideous crisis never reoccurs." *Id.* at H2705. Representative Annunzio, who supported the amendment, did so on the similar understanding that the treatment of supervisory goodwill in the unamended bill eliminated FHLBB forbearances. *Ibid.* Whatever side of the amendment they were on, the representatives who spoke on the Hyde Amendment did so with the understanding that the unamended statute did not provide an exception to the substantive requirements of FIRREA for institutions that had received forbearances from the FHLBB. The amendment was defeated in the House. *Id.*

at H2718. No other amendment was adopted that could have affected the treatment of supervisory goodwill.

Franklin Federal suggests that Congress's vote on the Hyde Amendment could have been a vote against Representative Hyde's administrative procedures themselves rather than a vote against recognizing forbearances. This misses the point. In the course of the floor debate, representatives expressed their understanding of what the statutory language meant. The debate is useful to us because it reveals a shared understanding of a particular text. *Nobody* expressed the view that FIRREA did not abrogate forbearance agreements regarding supervisory goodwill. The only discussion of the procedures themselves came from the *defenders* of the amendment who emphasized that the amendment would not automatically recognize all forbearances. For example, Representative Ridge, a proponent of the amendment, stated that "[w]e are not grandfathering all supervisory goodwill for all time and under all circumstances." *Id.* at H2712. Thus, we believe that it is safe to say that, as of the time of this debate, it was the understanding of the House, if not the whole Congress, that FIRREA abrogated forbearances that contradicted its express terms.

In any event, the OTS's construction of FIRREA is plainly a reasonable one. The OTS does not contradict the plain language of the statute, and is therefore entitled to deference from the interpreting court. *K-Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 290-92, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

IV

As we conclude that FIRREA abrogates the regulatory forbearance issued to Franklin by the FHLBB, we do not need to reach the issue of whether that forbearance constituted a binding element of a contract between Franklin

and the government, or, as the OTS claims, a mere statement of regulatory intent. If Franklin did have a contractual property interest, we believe that the evidence of congressional intent is strong enough to infer that Congress wanted to effect a taking. In the event that this action were determined to be a taking, Franklin would be entitled to compensation, not to equitable relief. *See Anchor Pointe Boat-A-Minium Association, Inc. v. Meinke*, 860 F.2d 215, 218 (6th Cir.1988).

V

For the above reasons, the judgment of the district court is REVERSED.

CONTIE, Senior Circuit Judge.

For the following reasons, I respectfully dissent.

I.

Though I agree with the majority's conclusion that "the suit against the OTS is sufficiently ripe," I do so for the reasons stated in my dissent in the companion case, *First Fed. Sav. Bank, et al. v. Ryan*, 927 F.2d 1345. Moreover, because the FDIC has threatened to terminate Franklin Federal's deposit insurance, I disagree with the majority's conclusion "that the claim against the FDIC is not ripe for review." *See* Appellees' Brief at 22 ("The OTS Supervisory Agent who is primarily responsible for the regulation of the institution informed Franklin Federal management that OTS would immediately seize the institution if FDIC initiates insurance termination proceedings. Thus, plaintiffs had no choice but to file this action when the Regional Director of FDIC subsequently informed the institution that the agency had decided to initiate insurance revocation proceedings in the absence of a new and significant capital infusion.").

Accordingly, I will now address the substantive merits of this action.

II.

A.

When Congress intends to upset previously settled expectations, it is obligated to do so in unambiguous terms. *See Bush v. Oceans Int'l*, 621 F.2d 207, 211 n. 4 (5th Cir.1980) ("[A] change in the status quo should not be inferred unless Congress has unmistakably indicated a wish to the contrary."). In the instant action, the government failed to identify any provision in FIRREA that *expressly* abrogates all conversion agreements; the government relies instead on strained inferences and select legislative history. Neither the courts nor the defendants are entitled to "impute to Congress such a radical departure from established law in the absence of express congressional command." *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950).

Contrary to the government's position, the only statutory provision in FIRREA that directly applies to the instant action expressly precludes the abrogation of contracts:

> (g) SAVINGS PROVISIONS RELATING TO FHLBB.—
>
> (1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.—
>
> Subsection (a) [which abolishes FSLIC and FHLBB] shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan Bank Board, or any other person, which—
>
> (A) arises under or pursuant to the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933, or any other provision of law ap-

> plicable with respect to such Board (other than title IV of the National Housing Act); and
>
> (B) existed on the day before the date of the enactment of this Act.

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73, § 401(g), 103 Stat. 183. Because the most basic tenet of statutory construction dictates that "courts are required, where possible, to give words their plain, unambiguous meaning," *Lynch v. Lyng*, 872 F.2d 718, 720-21 (6th Cir.1989), section 401(g)'s unambiguous language is conclusive "in the absence of 'a clearly expressed legislative intent to the contrary.'" *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) (citation omitted).

Though the government readily admits that section 401(g) applies to obligations and duties, the government nevertheless contends that section 401(g) does not apply to conversion agreements (though the section does not expressly exempt conversion agreements from section 401(g)'s scope). Specifically, the government suggests that we narrow the breadth of section 401(g) to apply solely to "existing contracts to lease space, for office supplies, and the like . . . ." If this were Congress' intent in enacting § 401(g), however, Congress could have, and should have, restricted the section's wording to the procurement contracts identified by the government. Instead, Congress elected to save "*any* right, duty, or obligation of the United States . . . .", *see* FIRREA § 401(g), which arises under, or pursuant to, the Federal Home Loan Bank Act or the Home Owners' Loan Act of 1933. Moreover, because Congress was well aware of conversion contracts when it adopted section 401(g), Congress' decision not to specifically exclude such contracts from section 401(g) might reflect Congress' intent to extend the section's protection to include existing conversion contracts. *See United States v. Rohm & Haas Co.*, 500 F.2d 167, 171

(5th Cir.1974) (citing *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389-90, 73 S.Ct. 381, 383-84, 97 L.Ed. 422 (1953)), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1352, 43 L.Ed.2d 439 (1975) ("Such a reading of the savings clause is consistent with the rule that savings clauses are to be broadly construed.").

Though the government argues that section 401(g) protects only those rights, duties and obligations endangered by the abolition of the FSLIC and the FHLBB, not by the enactment of FIRREA, the government's contention merely manipulates the express language of section 401(g). Section 401(g) preserves FSLIC's and FHLBB's pre-existing duties and obligations though the agencies no longer exist. Semantics notwithstanding, section 401(g)'s express language dictates that FIRREA not relieve the government of its existing legal duties and/or obligations.

The government similarly argues that defeat of the proposed Hyde Amendment conclusively establishes Congress' intent to abrogate all bargained-for forbearances that permit pre-FIRREA capital standards. Contrary to the government's contention, however, the issue before Congress when it considered the Hyde Amendment was not the validity of existing forbearances; instead, the Hyde Amendment contemplated the establishment of an administrative process to review possible contract claims. Though the appellants are correct that some representatives voted against the Hyde Amendment because they wanted all forbearance agreements abrogated, it is equally clear that many Congressmen opposed the Hyde Amendment because of the contemplated administrative process. Because the Hyde Amendment never presented Congress with the sole issue of whether conversion agreements should be abrogated, the amendment's defeat is irrelevant to this action because the appellants, the appellees, and this court can not determine, with any certainty, why Congress defeated the Hyde Amendment.

Though the appellants argue that FIRREA § 401(h) (which provides that agency "orders, resolutions, determinations, and regulations . . . shall continue in effect . . . until modified, terminated, set aside, or superseded in accordance with applicable law . . ." allows the government to terminate forbearances, a bargained-for forbearance constitutes a binding "obligation" or "duty," not merely an order, resolution, determination or regulation. Accordingly, if FHLBB's forbearance letter to Franklin Federal constitutes a bargained-for forbearance, *see infra*, then section 401(g) preserves the resulting governmental "obligation." The government's reliance on section 401(h) is without merit.

Although Congress *may have* intended to abrogate *all* existing forbearances (gratuitous and bargained-for) when it enacted FIRREA, section 401(g)'s express wording preserves the government's existing "duties" and "obligations" which necessarily include bargained-for (*quid pro quo*) forbearances. Accordingly, we must now determine whether an "obligation" or "duty" (pursuant to § 401(g)) exists in this action (in the form of a bargained-for forbearance).

B.

The appellee argues:

> What is at issue is whether Congress expressly abrogated all *contracts* between the government and the savings and loan industry. The Bank Board undoubtedly granted forbearances to scores of institutions that applied for assistance. But Franklin Federal, and its holding company, stand in a different light. The forbearance obtained by Franklin Federal was specifically negotiated and bargained-for. It was, moreover, granted in consideration for Franklin Financial's agreement to acquire the ailing institution and to provide an immediate capital injection of $5 million of the shareholders' personal funds into

> the troubled institution. Hence, Franklin Federal's right to treat supervisory goodwill as an asset does not stem "solely from a regulatory forbearance" as the government contends, but rather rests on a binding and enforceable contract.

Appellee's Brief at 24 (citation omitted) (emphasis in original).

On January 12, 1989, the parties entered into a binding agreement deemed the "Voting and Disposition Rights/ Dividend Agreement." The Agreement provided *inter alia*, that:

> B. This Agreement shall be deemed a contract made under and governed by Federal law.
>
> C. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective transferees, successors, assigns, heirs, administrators, executors, and trustees.
>
> . . . .
>
> F. This Agreement has been duly authorized, executed, and delivered, and constitutes, in accordance with its terms, a valid and binding obligation of the Acquiror and the FSLIC . . . .
>
> . . . .
>
> K. This Agreement, together with any understanding agreed to in writing by the parties, constitutes the entire agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with the subject matter hereof.

Voting and Disposition Rights/Dividend Agreement at 8-9.

Accordingly, the appellees argue that the conversion agreement includes four documents: Franklin Federal's business plan; the dividend agreement; the supervisory case findings; and, most importantly, the November 21,

1988 forbearance letter. The forbearance letter, signed by the Acting Secretary of the Federal Home Loan Bank Board, states (in its entirety):

> In connection with the approval by the Federal Home Loan Bank Board ("Board") of the Voluntary Supervisory Conversion and acquisition of Morristown Federal Savings and Loan Association, Morristown, Tennessee ("Morristown"), by Franklin Financial Group ("Franklin"), the converted institution shall be known as Franklin Federal Savings Bank, the following forbearance is hereby granted.
>
> > 1. For purposes of reporting to the Board, the value of any unidentifiable intangible assets resulting from accounting for the acquisition in accordance with the purchase method may be amortized by Franklin Federal Savings Bank over a period not to exceed 25 years by the straight line method.
>
> The forbearance extended by this letter does not relieve Franklin Federal Savings Bank of its continuing obligations to maintain records of its reserve and regulatory capital condition and to report its financial condition in accordance with applicable regulatory requirements. This letter does not and shall not be construed to constitute forbearance or waiver by the Board or the FSLIC with respect to any regulatory or other requirements other than those encompassed within the preceding paragraph 1. Other than the actions to enforce the regulatory requirements waived in accordance with paragraph 1 and the statutory provisions authorizing imposition of the waived requirement, insofar as such requirement is waived, the Board and the FSLIC expressly reserve all of their statutory rights and powers with respect to Franklin Federal Savings Bank including, without limitation, those under Section 5 of the Home Owners'

> Loan Act of 1933 and Section 406 and 407 of the National Housing Act.

Joint Appendix at 35.

Though the government challenges the district court's conclusion that the forbearance letter constitutes an integral part of the government's binding agreement ("obligation") with Franklin Federal Savings Bank, the government's arguments are unpersuasive.

The government first argues that the forbearance letter is merely a "unilateral grant by the regulator which did not give rise to a 'right, duty or obligation' within the meaning of Section 401(g)." The government's argument is belied, however, by the appellees' affidavits and the testimonial evidence presented at the preliminary injunction hearing. Charles Robinette, Franklin Federal's chief executive officer, testified that negotiations regarding the terms of the forbearance were conducted in the same manner as were the other terms of the acquisition. Robinette further testified that the forbearance was the linchpin of the agreement, adding that Franklin Financial would not have agreed to acquire Morristown had the government not agreed to the forbearance.

After reviewing all of the evidence, the district court held, *inter alia*, that:

> 2. The Court finds that the Federal Home Loan Bank Board had the authority to grant a forbearance as evidenced by the letter dated November 21, 1988 signed by the Acting Secretary, and that this grant gave the institution the right to amortize certain supervisory goodwill over a period not to exceed 25 years by the straight line method . . . .
>
> 3. The Court finds that the voting and dividend agreement contemplates that other writings are also included in the full supervisory agreement as entered into by the defendants and the plaintiffs. The Court

finds that the November 1988 grant of a forbearance is such a writing.

4. The Court finds that the forbearance agreement was an integral part of the entire agreement and was for the benefit of all parties in order to recapitalize the failing institution and prevent additional agency and taxpayer expenditures which would have been necessitated by a failure of the institution.

5. The Court finds that the plaintiffs would not have invested an additional five million dollars into this institution absent the forbearance agreement, inasmuch as Franklin Federal would have been insolvent and subject to closure at its inception absent this agreement.

District Court's July 16, 1990 Permanent Injunction Order at 1-2. The district court's factual findings may not be reversed unless clearly erroneous. Fed. R.Civ.P. 52(a). *See also United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 498 (6th Cir. 1984) ("The finding that an agreement existed between G & M and Local 307 is a factual determination and is thus subject to the 'clearly erroneous' standard of review."); *Richter v. Westab, Inc.*, 529 F.2d 896, 899 (6th Cir.1976) (contract's existence reviewed under clearly erroneous standard).

The bargained-for (*quid pro quo*) forbearance clearly constitutes an integral component of the negotiated agreement between the FHLBB and Franklin Federal and was not, as the government suggests, merely a gratuitous forbearance. Franklin Federal's shareholders bargained for the instant forbearance and provided the government valuable consideration in reliance upon the government's promise to allow Franklin Federal the right to amortize supervisory goodwill over a 25-year period. In similar circumstances, numerous district courts have treated the

bargained-for (*quid pro quo*) forbearances as contractual rather than as mere regulatory determinations (gratuitous forbearances). *Sterling Sav. Ass'n v. Ryan*, 751 F. Supp. 871 (E.D.Wash.1990); *Security Fed. Sav. Bank of Florida v. Director, Office of Thrift Supervision*, 747 F. Supp. 656 (N.D.Fla.1990); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 746 F.Supp. 1042 (D. Or.1990); *Guaranty Fin. Serv., Inc. v. Director, Office of Thrift Supervision*, 742 F.Supp. 1159 (M.D.Ga.1990). Accordingly, the district court's findings regarding the instant forbearance letter are not clearly erroneous.

III.

For the aforementioned reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. CIV-2-90-166

FRANKLIN FEDERAL SAVINGS BANK

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*

ORDER

[Filed Jul. 16, 1990]

This matter came before the Court on July 9, 1990 for a hearing in regard to a motion for a temporary injunction filed by the plaintiffs. After careful consideration of the argument of counsel, the testimony of witnesses, and the record as a whole, the Court makes the following findings of fact and conclusions of law.

1. The Court finds that this Court does have jurisdiction of this matter pursuant to Title 12 § 1464(d)(1)(A) and that Title 12 § 1818i is inapplicable to the case at bar, because this Court is not attempting to order the defendant F.D.I.C. to refrain from the issuance or enforcement of a notice or order under that section.

2. The Court finds that the Federal Home Loan Bank Board had the authority to grant a forbearance as evidenced by the letter dated November 21, 1988 signed by the Acting Secretary, and that this grant gave the in-

stitution the right to amortize certain supervisory goodwill over a period not to exceed 25 years by the straight line method. It is expressly agreed in this letter that "*Other* than the actions to enforce the regulatory requirements waived in accordance with paragraph 1 (which is the paragraph granting the right to amortize good will) and the statutory provisions authorizing imposition of the waived requirement, insofar as such requirement is waived, the Board and the FSLIC expressly reserve all their statutory rights and powers with respect to Franklin Federal Savings Bank including, without limitation, those under Section 5 of the Home Owners' Loan Act of 1933 and Section 406 and 407 of the National Housing Act." Therefore, both the Board and the FSLIC waived their statutory rights and powers in regard to the amortization of this supervisory goodwill.

3. The Court finds that the voting and dividend agreement contemplates that other writings are also included in the full supervisory agreement as entered into by the defendants and the plaintiffs. The Court finds that the November 1988 grant of a forbearance is such a writing.

4. The Court finds that the forebearance agreement was an integral part of the entire agreement and was for the benefit of all parties in order to recapitalize the failing institution and prevent additional agency and taxpayer expenditures which would have been necessitated by a failure of the institution.

5. The Court finds that the plaintiffs would not have invested an additional five million dollars into this institution absent the forbearance agreement, inasmuch as Franklin Federal would have been insolvent and subject to closure at its inception absent this agreement.

6. The Court finds that although the plaintiff institution initially had a deficit of 9.6 million dollars before the five million dollar infusion of capital, that the institution is now viable and presently has the earnings

to gradually achieve tangible capital as required by FIRREA, and that the capital at the present time without supervisory goodwill is a negative tangible capital of 2.184 million dollars. Thus it can be seen that the infusion of capital and the revitalized operation of the institution has inured to the benefit of the F.D.I.C. and the American public to a total sum of over seven million dollars.

7. Section 401(g) of FIRREA specifically provides

(1) Existing Right, Duties and Obligations Not Affected.

—Subsection [abolishing FSLIC and FLHBB] shall not affect the validity of any right, duty of obligation of the United States, the [FHLBB], or any other person, which—

(B) existed on the day before the date of of the enactment of this Act.

FIRREA was enacted on August 9, 1989, while the date of the grant of the forbearance in this cause was November 21, 1988. Therefore, the Court finds that FIRREA does not abrogate the grant of this forbearance and this forbearance is binding on the defendants who are the successors in interest to the FSLIC and FLHBB [sic]. Although the defendants argue that Section 401(h) interplays with FIRREA itself to immediately destroy the benefit of Section 401(g) by providing that rights would exist until modified, terminated, or superseded by law, this Court disagrees. The Court does not find that Section 401(g) was a mere nullity, and in any event, subsequent changes in legislation in regard to this particular forbearance were expressly waived in the FLHBB [sic] forbearance grant of November 1988.

Accordingly, it is hereby ORDERED that the defendants in this cause are PERMANENTLY ENJOINED from excluding the amortization of supervisory goodwill from any and all determinations of the plaintiff institu-

tion's capitalization as set out in the grant dated November 21, 1988 attached as Exhibit I hereto. This order does not relieve Franklin Federal Savings Bank of its continuing obligations to maintain records of its reserve and regulatory capital condition and to report its financial condition in accordance with applicable regulatory requirements nor does it prohibit the defendant from acting with respect to any regulatory or other requirement other than those as set out in Paragraph 1 of Exhibit I.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
United States District Judge

Federal Home Loan Bank Board

1700 G Street, N.W.
Washington, DC 20962
Federal Home Loan [Illegible]
Federal Home Loan Mortgage Corporation
Federal Savinsg and Loan Insurance Corporation

November 21, 1988

Board of Directors
Morristown Federal Savings and Loan Association
522 West First North
P.O. Box 1839
Morristown, Tennessee 37814

In connection with the approval by the Federal Home Loan Bank Board ("Board") of the Voluntary Supervisory Conversion and acquisition of Morristown Federal Savings and Loan Association, Morristown, Tennessee ("Morristown"), by Franklin Financial Group ("Franklin"), the converted institution shall be known as Franklin Federal Savings Bank, the following forbearance is hereby granted.

1. For purposes of reporting to the Board, the value of any unidentifiable intangible asests resulting from accounting for the acquisition in accordance with the purchase method may be amortized by Franklin Federal Savings Bank over a period not to exceed 25 years by the straight line method.

The forbearance extended by this letter does not relieve Franklin Federal Savings Bank of its continuing obligations to maintain records of its reserve and regulatory capital condition and to report its financial condition in accordance with applicable regulatory requirements. This letter does not and shall not be construed to constitute forbearance or waiver by the Board or the FSLIC with respect to any regulatory or other require-

ments other than those encompassed within the preceding paragraph 1. Other than the actions to enforce the regulatory requirements waived in accordance with paragraph 1 and the statutory provisions authorizing imposition of the waived requirement, insofar as such requirement is waived, the Board and the FSLIC expressly reserve all of their statutory rights and powers with respect to Franklin Federal Savings Bank including, without limitation, those under Section 5 of the Home Owners' Loan Act of 1933 and Section 406 and 407 of the National Housing Act.

By the Federal Home Loan
Bank Board

/s/ [Illegible]
Acting Secretary

APPENDIX C

RELEVANT PROVISIONS OF THE RECOVERY ACT

SECTION 301 (relevant portion codified at 12 U.S.C. 1464(t)(3)):

(3) TRANSITION RULE.—

(A) Certain Qualifying Supervisory Goodwill Included In Calculating Core Capital.—Notwithstanding paragraph 9(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	The applicable percentage is:
Prior to Jan. 1, 1992	1.500 percent
Jan. 1, 1992-Dec. 31, 1992	1.000 percent
Jan. 1, 1993-Dec. 31, 1993	0.750 percent
Jan. 1, 1994-Dec. 31, 1994	0.375 percent
Thereafter	0 percent

SECTION 401 FSLIC AND FEDERAL HOME LOAN BANK BOARD ABOLISHED.

(g) SAVINGS PROVISIONS RELATING TO FHLBB.—

(1) Existing Rights, Duties, And Obligations Not Affected.—

Subsection (a) shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan Bank Board, or any other person, which—

(A) arises under or pursuant to the Federal Home Loan Bank Board, the Home Owners' Loan Act of 1933, or any other provision of law applicable with respect to such Board (other than title IV of the National Housing Act); and

(B) existed on the day before the date of the enactment of this Act.

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No. 90-1881

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANKLIN FEDERAL SAVINGS BANK, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

HARRIS WEINSTEIN
Chief Counsel

THOMAS SEGAL
Deputy Chief Counsel

AARON B. KAHN
Assistant Chief Counsel
Office of Thrift Supervision
Washington, D.C. 20552

QUESTION PRESENTED

Whether the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which imposes new capital requirements on savings and loan institutions and restricts their ability to use "supervisory goodwill" to meet those requirements, supersedes an earlier "regulatory forbearance" granted by the now defunct Federal Home Loan Bank Board concerning the use of such goodwill.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 927 F.2d 1332. The decision of the district court (Pet. App. 28a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1991. The petition for a writ of certiorari was filed on June 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Morristown Federal Savings and Loan Association suffered financial losses from 1983 to 1988. In the

mid-1980s, investors formed a holding company, Franklin Financial Group, Inc., to acquire Morristown upon its conversion from the mutual to the stock form of ownership. In accounting for the transaction on its books, the conversion plan called for the new institution (to be named Franklin Federal Savings Bank) to treat Morristown's negative net worth as an intangible asset called "supervisory goodwill," to be amortized over a period of time. Pet. App. 3a-4a.

The Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (Bank Board) approved the transaction in late 1988. In connection with that approval, the Bank Board issued a "forbearance letter" granting Franklin's request for permission to amortize certain intangible assets, including supervisory goodwill, for a period not to exceed 25 years. See Pet. App. 5a, 32a-33a. In January 1989, Franklin and FSLIC executed a Voting and Disposition Rights/Dividend Agreement, containing the terms of the approved transaction. Section VIII(D) of the agreement states:

> All references to regulations of the [Bank] Board or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease Acquiror's obligation under this Agreement.

Pet. App. 5a (emphasis omitted).

2. On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified in part in scattered sections of 12 U.S.C.). FIRREA addresses the severe crisis throughout the thrift industry that was occasioned, in large measure,

by the significant undercapitalization of many savings institutions. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 310 (1989) [hereinafter *House Report*]. In addition to providing massive public funding to bolster the thrift industry and to restore public confidence, FIRREA was intended to prevent a recurrence of past financial abuses and poor financial practices. *Id.* at 307-308.

FIRREA abolished both FSLIC and the Bank Board and transferred their functions to a new insurance fund under the Federal Deposit Insurance Corporation (FDIC) and the newly created Office of Thrift Supervision (OTS) within the Department of the Treasury. FIRREA § 401(a) and (h), 103 Stat. 354, 357; see FIRREA §§ 201(b), 202, 103 Stat. 188. A key ingredient of the legislative reform is strengthened capital requirements. *House Report* 310-311, 322; 135 Cong. Rec. H2711 (daily ed. June 16, 1989) (Rep. Pelosi).

As pertinent here, Section 301 of FIRREA imposes three capital requirements on thrift institutions. "Core capital" is to coincide with "core capital" as defined by the Comptroller of the Currency for national banks, "less any unidentifiable intangible assets" and plus certain mortgage servicing rights, 12 U.S.C. 1464(t)(9)(A),[1] and is to be "not less than 3 percent of the savings association's total assets." 12 U.S.C. 1464(t)(2)(A). Core capital can include only limited amounts of supervisory goodwill, with the amount being gradually reduced to zero by January 1, 1995. 12 U.S.C. 1464(t)(3)(A). Moreover, supervisory goodwill included in core capital has to be amortized annually at a rate that would lead to full amortization in a

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[1] All references in this brief to provisions of Title 12 of the United States Code are to the United States Code (Supp. I 1989).

maximum of 20 years. See 12 U.S.C. 1464(t)(9)(B). "Tangible capital" is defined as "core capital minus any intangible assets," 12 U.S.C. 1464(t)(9)(C). Tangible capital thus excludes all supervisory goodwill, and is to be "not less than 1.5 percent of the savings association's total assets." 12 U.S.C. 1464(t)(2)(B). The "risk-based capital" requirement was to be defined by the Director of OTS so as not to "result in materially lower levels of capital being required of savings associations under the risk-based capital requirement than would be required under the risk-based capital standards applicable to national banks." 12 U.S.C. 1464(t)(2)(C). In Thrift Bulletin 38-2 (Jan. 9, 1990), OTS announced that it would apply the new capital standards to all savings institutions, including those that had previously been granted forbearances by the Bank Board.

Failure to comply with the new capital standards will result in the imposition of asset growth restrictions and may also result in the issuance of a capital directive limiting the use of thrift funds. 12 U.S.C. 1464(t)(6). It can also lead to the appointment of a conservator or receiver and provide cause to commence proceedings to terminate deposit insurance. *Id.* §§ 1464(d)(2), 1818(a). OTS, however, has authority to grant relief from most sanctions that could be imposed for failure to satisfy capital standards. *Id.* § 1464(t)(7).

3. Petitioners commenced this action, seeking a permanent injunction against enforcement of the capitalization provisions limiting use of supervisory goodwill. The court entered a restraining order against OTS and the FDIC and, after hearing evidence, granted the petitioners' request for a permanent injunction.

The district court found that the forbearance letter issued in connection with the approval of the conversion and sale of Morristown "was an integral part of the entire agreement and was for the benefit of all parties." Pet. App. 29a. It also concluded that FIRREA does not "abrogate" the grant of the forbearance, which it characterized as "binding" on OTS and the FDIC as successors to the Bank Board and FSLIC. *Id.* at 30a. In reaching that determination, the district court relied on Section 401(g)(1) of FIRREA, 103 Stat. 356-357, which states that the provision abolishing the Bank Board and FSLIC (§ 401(a), 103 Stat. 354) "shall not affect the validity of any right, duty, or obligation of the United States, the * * * Bank Board, or any other person, which * * * existed on the day before the date of the enactment of this Act." Pet. App. 30a. The court also recorded its belief that, in any event, the Bank Board's forbearance letter "expressly waived" any subsequent legislative changes. *Ibid.* The court thus permanently enjoined OTS and the FDIC "from excluding the amortization of supervisory goodwill from any and all determinations of [Franklin's] capitalization as set out in the [forbearance letter]." *Id.* at 30a-31a.

4. The Director of OTS and the FDIC appealed, and the court of appeals reversed. Pet. App. 1a-18a.[2] The

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[2] At the time petitioners filed this action, neither OTS nor the FDIC had initiated administrative action against petitioners in order to effect their compliance with the new capital standards. The court of appeals determined that, although it was "a close case" (Pet. App. 7a-8a), petitioners' claim against OTS was ripe for review inasmuch as Thrift Bulletin 38-2 amounted to an unequivocal and final statement of that agency's position, and Franklin would suffer sufficient harm without judicial review. Pet. App. 8a-11a. The court concluded otherwise as to the FDIC, however, because that agency had

court found that the capital requirements imposed by FIRREA conflict with those provided for in the earlier forbearance letter, particularly insofar as 12 U.S.C. 1464(t)(9)(B) requires amortization of supervisory goodwill within no more than 20 years, rather than the 25 allowed by the letter. Pet. App. 12a. The court, however, rejected petitioners' argument that Section 401(g)(1) of the Act nonetheless preserves the forbearance. Finding no support for the view that Section 401(g)(1) was meant to affect the scope of FIRREA's substantive requirements, the court held that "the plain language of the statute limits the reach of section 401(g)(1) to those obligations that could have been affected by virtue of the abolition of the FSLIC or the [Bank Board]." Pet. App. 14a. Since it was the substantive provisions of FIRREA imposing the new capital requirements—not the abolition of FSLIC and the Bank Board and transfer of their responsibilities to new agencies—that conflicted with the capital requirements in the forbearance letter, Section 401(g)(1) did not limit the application of the new capital requirements to petitioners. Pet. App. 14a. After finding added support for this conclusion in FIRREA's legislative history (Pet. App. 15a-17a), the court concluded that OTS's construction of the Act is reasonable and entitled to deference under *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 290-292 (1988), and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. 17a.

The court of appeals found no need to decide whether the forbearance letter had the binding force of a contract, as petitioners had urged, or was instead a "mere statement of regulatory intent." Pet. App.

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taken no action against the petitioners. *Id.* at 11a-12a. Petitioners do not here challenge that ruling.

17a-18a. The court indicated, however, that if the forbearance letter were a contract, there was sufficient evidence to infer congressional intent to effect a taking, for which compensation, rather than equitable relief, would be the proper remedy. *Id.* at 18a.

Senior Circuit Judge Contie dissented. Pet. App. 18a-27a. In his view, Section 401(g)(1) of FIRREA "directly applies" to this case. Pet. App. 19a. He rejected the court's conclusion that that provision preserves only those rights, duties, and obligations that would otherwise be affected by the abolition of the FSLIC and Bank Board. Instead, he read the language of Section 401(g)(1) as mandating the government's observance of all obligations it incurred prior to the passage of the Act, unless explicitly abrogated by the statute. He found no such explicit congressional intent insofar as supervisory goodwill forbearances are concerned. Pet. App. 21a-22a. Judge Contie concluded that the forbearance involved here was a bargained-for, necessary component of the agreement between the Bank Board and Franklin, by which the government must abide. *Id.* at 26a-27a.

ARGUMENT

Although, as petitioners note (Pet. 9-11), a number of district courts have addressed the issue at hand with varying outcomes, the decision of the court of appeals in this case is correct and entirely consistent with that of the only other court of appeals to have reached the issue. Accordingly, further review is unwarranted.

1. In *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994 (1991), the Eleventh Circuit interpreted both 12 U.S.C. 1464(t)(3)(A) and Section 401(g)(1) exactly as did the court of appeals here. The Eleventh Circuit found 12 U.S.C. 1464(t)(3)(A) to be "unqualified" in

that "[i]t provides for no exceptions to the phase-out schedule it establishes" for the use of supervisory goodwill in calculating core capital. 928 F.2d at 1002. As for Section 401(g)(1), the *Guaranty* court concluded, as did the Sixth Circuit in this case, that by its terms that provision "is concerned only with the effect of subsection (a), which eliminates the Bank Board and the FSLIC." 928 F.2d at 1003. The Eleventh Circuit reasoned that "the possible loss of [the thrift's] supervisory goodwill forbearance is the result not of the abolition of the agencies, but of the new capital standards, and that a savings provision that says that the abolition of the agencies 'shall not affect the validity of any right, duty, or obligation' is inapplicable to [the thrift's] situation." *Ibid.* See also *id.* at 1004-1006 (concluding that legislative history shows that "Congress intended * * * to abrogate capital forbearances"). The court therefore held that the OTS interpretation of FIRREA was not only "permissible," but also "unambiguously support[ed]" by the legislative history. *Id.* at 1006.

As is often the case with new and complex legislation, the initial decisions of the district courts concerning FIRREA's mandated treatment of supervisory goodwill have varied in result. Until and unless there is a conflict in the decisions of the courts of appeals on this issue, however, further review of this issue is unwarranted.

2. The decision of the court of appeals is correct. The unmistakable intent of FIRREA was to resolve the crisis resulting from the severe financial problems in the thrift industry. Congress recognized that one cause of the great losses suffered by taxpayers was past reliance by thrifts on intangible assets of illusory value. A central feature of the reforms in FIRREA is thus the requirement that tangible capital of real

economic value replace substanceless intangibles in the finances of the Nation's thrift institutions. Contrary to petitioners' contentions (Pet. 15-17), Congress unambiguously expressed that requirement in the straightforward language of 12 U.S.C. 1464(t).

The court of appeals and OTS properly declined to read the largely ministerial savings provision of Section 401(g)(1) so as to subvert the unambiguous and universally worded substantive requirements of FIRREA. Section 401(g)(1) appears in Title IV of FIRREA, "Transfer of Functions, Personnel, and Property," and by its terms applies only to those matters affected by the abolition of the predecessor agencies. The treatment of supervisory goodwill in 12 U.S.C. 1464(t) is wholly unrelated to the fact that the Bank Board and FSLIC no longer exist.

In addition, although Section 401(g) does not address the continued applicability of the forbearances granted by FSLIC and the Bank Board, another provision of FIRREA does speak directly to that issue. Section 401(h) of FIRREA, 103 Stat. 357 (emphasis added), provides that

> all orders, resolutions, determinations, and regulations * * * issued, made, prescribed, or allowed to become effective by the [FSLIC] or the * * * Bank Board * * * [that] are in effect on the date this Act takes effect, shall continue in effect * * * *until modified, terminated, set aside, or superseded* in accordance with applicable law by the Director of [OTS or] the [FDIC] * * * or *by operation of law.*

Through this plain language, the dictates of FIRREA concerning the allowable use of supervisory goodwill, and the OTS Director's action pursuant to that mandate, supersede any prior regulatory waiver.

In short, the plain language of the statute, in full accord with the legislative history reviewed by the court of appeals (see Pet. App. 15a-17a) and the surrounding statutory framework (see *id.* at 14a), supports the OTS interpretation. See *id.* at 14a-17a. That demonstrably permissible interpretation is entitled to *Chevron* deference.

3. Petitioners purport to rely on the principle that a congressional intent to upset settled expectations must be stated in "clear, unambiguous and unmistakable terms." Pet. 15. Even if FIRREA were ambiguous and OTS's interpretation of FIRREA were not entitled to deference, however, petitioners' principle would have no application to this case.

First, the letter was not a contract, but rather a "regulatory decision" issued in the context of a pervasively regulated industry. See *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-470 (1985). The Bank Board merely granted a waiver of certain then-existing (albeit less rigorous) regulatory requirements; it did not thereby create any corresponding obligations or duties on the part of the government, and the modification of the capital requirements did not upset any reasonable, settled expectations.

Second, even if the Bank Board's forbearance letter were a contract, this Court has made clear that such contracts are subject to subsequent legislation and are to be construed so as to avoid foreclosing the exercise of sovereign authority. *Bowen* v. *Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52-53 (1986). See also *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898) ("governmental [regulatory] powers cannot be contracted away"). So construing the relevant documents involved here poses no difficulty. Indeed, section VIII(D) of the Vot-

ing and Disposition Rights/Dividend Agreement made clear that subsequent regulatory changes "may be made" and that such changes "may increase or decrease [their] obligation under this Agreement." Pet. App. 5a. Far from binding the federal government indefinitely to freeze the former regulatory requirements as applied to Franklin Federal, the documents that formed the alleged "contract" in this case thus put petitioners on ample notice that Franklin Federal would not be exempt from future regulatory changes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
CHRISTINE N. KOHL
Attorneys

HARRIS WEINSTEIN
Chief Counsel

THOMAS SEGAL
Deputy Chief Counsel

AARON B. KAHN
Assistant Chief Counsel

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OCTOBER TERM, 1990

FRANKLIN FEDERAL SAVINGS BANK, et al.,
Petitioners,

vs.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF SECURITY SAVINGS AND LOAN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER FRANKLIN FEDERAL SAVINGS BANK

Of Counsel:
ALAN W. PERRY
Forman, Perry, Watkins & Krutz
Twelfth Floor
One Jackson Plaza
188 East Capitol St.
P.O. Box 22608
Jackson, MS 39225-2608
(601) 969-6011

WILLIAM C. HUMPHREYS, JR.
(Counsel of Record)
BENJAMIN F. JOHNSON III
MARY C. GILL
Alston & Bird
One Atlantic Center
1201 W. Peachtree St.
Atlanta, GA 30309-3424
(404) 881-7000
Attorneys for Amicus Curiae
Security Savings and
Loan Association

July 5, 1991

QUESTION PRESENTED

Whether the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA") permits the Office of Thrift Supervision ("OTS") to abrogate binding contracts entered into between savings and loan associations and Federal Home Loan Bank Board ("FHLBB") and/or Federal Savings and Loan Insurance Corporation ("FSLIC").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANKLIN FEDERAL SAVINGS BANK, et al.,
Petitioners,

vs.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF
SECURITY SAVINGS AND LOAN ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONER
FRANKLIN FEDERAL SAVINGS BANK

INTEREST OF AMICUS CURIAE

Security Savings and Loan Association ("Security Savings") respectfully submits this brief as *amicus curiae* in support of Franklin Federal Savings Bank's Petition for a Writ of Certiorari. Security Savings has obtained letters of consent to file this amicus curiae brief from the parties, which it files contemporaneously herewith in accordance with the Rules of the United States Supreme Court, Rule 37.2. 28 U.S.C. (1990).

Security Savings is a stock, state chartered savings and loan association organized under the laws of the State of Mississippi. It was chartered in 1961 and is presently

headquartered in Jackson, Mississippi. Security Savings is not now and never has been an institution engaged in fraud or corruption, has no history of excessive officer and director salaries and has never paid dividends to its shareholders. It has reinvested its earnings back into its operations and has sought to serve the financial needs of its community for thirty years.

On September 26, 1990 Security Savings filed suit in the United States District Court for the Southern District of Mississippi against the Director, Office of Thrift Supervision ("OTS") and other federal agencies to enjoin the enforcement of certain regulations of the OTS, which contravened the terms of a binding agreement Security Savings had with OTS's predecessor agency, Federal Home Loan Bank Board ("FHLBB"), and which were contrary to certain provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified in 12 U.S.C.). On February 26, 1991, after a full evidentiary hearing, the district court entered a permanent injunction enjoining the government from reneging on its agreement, holding that FIRREA preserved the rights and obligations of the parties arising from that agreement. Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 761 F. Supp. 1277 (S.D. Miss.), *appeal docketed*, No. 91-1570 (5th Cir. May 24, 1991). That judgment is currently on appeal in the United States Court of Appeals for the Fifth Circuit. It is one of the four appeals referenced by Petitioner and one of the thirty-four pending cases identified by the government, each of which raises similar issues.

The resolution of each of these cases turns upon the proper construction of certain provisions of FIRREA. The district courts, the Courts of Appeal, the savings and loan institutions affected by these particular provisions and the federal agencies are in critical need of uniformity and

guidance from the United States Supreme Court. It is of paramount importance to Security Savings and each of these institutions that this question of statutory construction be resolved as promptly as possible.

ARGUMENT

I. BACKGROUND OF THE ISSUE

Over the last decade, the thrift industry has experienced tremendous change and turbulence, both in the laws and the regulations governing it and in the resulting financial impact upon the industry. To fully understand the issue presented by the Petition, it is necessary to understand the historical and economic forces that ultimately led to the "savings and loan crisis" and the efforts by FHLBB and FSLIC in the mid-1980's to adopt procedures to deal with the then rapidly growing number of insolvent institutions. The unifying issue presented by the numerous cases now pending throughout the country can only be understood in the framework of these events.

FSLIC is an agency of the United States, which, under the National Housing Act of 1934, as amended, was charged with, among other things, insuring the accounts of depositors in savings banks and savings and loan associations that were members of the Federal Home Loan Bank system, and enforcing compliance by such institutions with regulatory capital requirements. Prior to 1989 and the enactment of FIRREA, FSLIC was operated under the direction of FHLBB, pursuant to Title 12 United States Code Section 1725 (1987).

Under the Home Owners' Loan Act of 1933, as amended, FHLBB was charged with, among other things, regulating and supervising federally chartered savings and loan associations, acting as the operating head of FSLIC and enforcing compliance by such institutions with regulatory capital requirements established under Title 12 United States Code Section 1464(s)(1989).

During the late 1970's and early 1980's, unprecedently high interest rates pushed the cost to thrift institutions of obtaining and retaining new deposits substantially above the rate of return on long term-fixed rate mortgages and thrift portfolios. As a result of the substantial "negative spread" between the thrift industry's cost of funds and its return on assets, the industry sustained heavy operating losses in 1981 and 1982.1/

The magnitude of the losses was immense. In 1981-1982, the thrift industry sustained an operating loss of $8.9 billion, with a record of $3.3 billion in the first half of 1982 alone. During the last half of 1981 and the first half of 1982, more than 80% of all FSLIC-insured thrifts incurred operating losses. 1985 FHLBB Ann. Rep. 5-6.

In the mid-1980's, the number of troubled thrifts increased, as did losses to the FSLIC fund. As a result of the deteriorating condition of the FSLIC insurance fund, FHLBB sought to find healthy thrifts or other investor

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1/ Housing And Urban Renewal Recovery Act of 1982: Before the Subcomm. on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. (1982) (testimony of Richard T. Pratt, then Chairman, FHLBB).

groups to acquire or recapitalize troubled institutions through the use of FSLIC's authority, under Section 406 of the National Housing Act. 12 U.S.C. § 1729 (1987). Many of these "supervisory transactions" were "assisted transactions" in that they involved some new infusion of capital by FSLIC and/or the granting of regulatory forbearances by FHLBB and/or FSLIC which permitted the institutions to continue to operate, but with modified capital requirements. Under Section 406, FSLIC was authorized to provide financial assistance to acquiring institutions.

Although the cost of arranging these mergers was high, doing so preserved funds which otherwise would have been expended in a liquidation of the failing thrifts. As an example, in 1981 FSLIC provided financial assistance to thirty supervisory mergers in the form of cash contributions, FSLIC notes, and asset purchases. The total cost (calculated using the present value method) of the first seven of these was $344 million. Nevertheless, FSLIC's cost was only seventy-five percent of the cost that FSLIC would have incurred had it been forced to liquidate the seven troubled thrifts and pay off the depositors. 1981 FHLBB Ann. Rep. 16.

By year-end 1981, the FSLIC fund was down to $7 billion. As more and more FSLIC-insured thrifts became insolvent or troubled, FSLIC and FHLBB realized that continuing to facilitate supervisory mergers with cash contributions and FSLIC notes would exhaust the

insurance fund by April, 1982.[2/] The number of problem cases, the volume of assets handled by FSLIC and default prevention transactions continued on record levels in 1983. During 1984 and 1985, the continued growth and the size and complexity of problem cases requiring FSLIC intervention created a record-high demand on FSLIC resources, precipitating a further decline in FSLIC reserves from $6.4 billion at the end of 1983 to approximately $5.6 billion at the end of 1984. 1985 FHLBB Ann. Rep. 25, 29.

FSLIC resolved thirty-five problem cases in 1985 involving total assets of $6.5 billion. 1985 FHLBB Ann. Rep. 26. Twenty-five of these cases involved asset assisted acquisitions representing $4.4 billion in total assets. Yet due to the willingness of the private sector to participate in assisted transactions, the cost to FSLIC was reduced. Through techniques such as interstate, inter-industry, and private-investor acquisitions, the twenty-five assisted acquisitions saved FSLIC $547 million over the estimated cost of liquidation. Id. at 25.

FSLIC's capital needs became desperate in 1986. The total reserves for FSLIC had diminished by year-end to negative $6.3 billion. 1986 FHLBB Ann. Rep. 15, 25. In 1986, the gap between profitable thrifts and unprofitable ones widened, with approximately one-fifth of the institutions experiencing accelerating losses. Id. at 2, 5. FHLBB and FSLIC resolved twenty-seven problem thrifts with assisted mergers and acquisitions in 1986, involving $7.4 billion in assets, and FSLIC still was forced to liquidate ten institutions in 1986. Id. at 27.

2/ Report by H. Brent Beasley, Director, FSLIC, Annual Stockholders Meeting of the Federal Home Loan Bank of Topeka (Apr. 13, 1982).

In sum, it was apparent that FSLIC lacked the financial resources to honor all of its obligations to depositors of the troubled thrifts. To help alleviate the pressure on these funds, FSLIC and FHLBB carried out a policy of negotiating, on a case-by-case basis, beneficial regulatory capital terms and conditions to encourage healthy thrifts to merge with the failing thrifts, thus taking these failing thrifts off the government's hands at the smallest out-of-pocket cost.

A. FHLBB POLICY REGARDING "SUPERVISORY GOODWILL"

Among the terms agreed to by the agencies was the ability to report "supervisory goodwill" as an asset for purposes of calculating regulatory capital. In mid-1981, when the FSLIC insurance fund was first severely threatened, FSLIC and FHLBB were forced to revise their assistance policies regarding supervisory mergers in order to prevent, or at least forestall, exhaustion of the fund. Among other changes, FSLIC and FHLBB began to induce healthy institutions to acquire failing thrifts at a substantially reduced cost to FSLIC by adopting an aggressive application of the "purchase method" of accounting for mergers.

Then applicable Generally Accepted Accounting Principles ("GAAP") required, in acquisitions using the "purchase method" of accounting, that the book value of the acquired thrift's assets and liabilities be adjusted ("mark-to-market") to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (including liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill" -- an intangible asset to be amortized under GAAP on a straightline basis over a period of up to forty years.

The history of the FHLBB approach to goodwill was described in the statement of Richard T. Pratt, Chairman of FHLBB from 1981 to 1983, before the United States House of Representatives, Committee on Banking, Finance and Urban Affairs, October 1, 1990 (hereinafter "1990 Pratt Statement").

> As a general matter, the inclusion of goodwill was permitted under GAAP and, at that time, it allowed goodwill to be amortized over its estimated life, not to exceed 40 years. The Bank Board permitted goodwill for capital purposes in accordance with GAAP. To varying degrees, other federal banking regulators (the Comptroller, FDIC and Federal Reserve Board) similarly permitted the inclusion of goodwill and/or core deposit intangibles in the capital accounts of commercial banks or bank holding companies during this period.
>
> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. The GAAP approach to purchase accounting mergers provided a bridge which allowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it. It facilitated mergers without incurring the inordinate cash costs

> associated with liquidating institutions during the most unfavorable cyclical peak in American economic history.

Id. at 80, 81 (footnotes omitted).

Thus, in an acquisition in which the aggregate fair market value of liability assumed by the acquirer exceeded the aggregate fair market value of the failing thrift's assets, the excess was carried on the resulting institution's books as goodwill. FSLIC and FHLBB gave continued assurances to the acquiring institutions that this "supervisory goodwill" would be includable as capital for purposes of satisfying regulatory minimum capital requirements, and that it could be amortized over periods of up to forty years. In giving this encouragement, FHLBB intended to, and did, induce healthy institutions to acquire insolvent or failing thrifts with reduced cash assistance from FSLIC, thus preserving its fund.

In 1982, the Financial Accounting Standards Board issued a Statement of Financial Accounting Standards No. 72 ("FASB 72") amending GAAP applicable to mergers initiated after September 30, 1982. FASB 72 generally required that goodwill arising under the purchase method be amortized over a period substantially shorter than previously allowed. However, so valuable was the supervisory goodwill to the disposition of insolvent thrifts that FHLBB and FSLIC continued to induce healthy institutions to acquire failing thrifts by allowing supervisory goodwill to be included in regulatory capital to be amortized over a period of time exceeding that then allowed by GAAP.

Indeed, supervisory mergers using purchase method accounting became a "supervisory tool," designed, as then Chairman Pratt acknowledged, to "spread as much of the industry's own net worth as possible over the industry's

troubled spots as a means of conserving the FSLIC's insurance fund."3/

FHLBB's assurances to acquiring institutions that they could utilize purchase accounting and the resulting goodwill was critical to inducing healthy institutions to take over failing thrifts. In effect, the goodwill approach provided that the acquiring institution could purchase the "going concern" value of the failing thrift, and that the cost of acquiring that intangible asset would be reflected as an asset for purposes of computing regulatory capital. The recognition of goodwill was essential to FHLBB and FSLIC since it provided a market for the assets of the failing thrifts at a price exceeding the liquidation value of those assets. Thus, the sale of the going concern value of the failing thrifts was a key element of reducing FSLIC's cost with respect to a failing thrift. By adopting regulatory policies encouraging the use of purchase method accounting and supervisory goodwill for supervisory mergers, FHLBB and FSLIC substantially reduced the costs of financial assistance in such mergers.

B. THE ACQUISITION BY SECURITY SAVINGS OF AN INSOLVENT THRIFT IS ILLUSTRATIVE OF FHLBB POLICY OF INDUCING MERGERS AT A REDUCED COST THROUGH THE USE OF SUPERVISORY GOODWILL

Security Savings is an example of one of the healthy institutions which was willing to negotiate an agreement

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3/ Capital Assistance Acts and Deposit Ins. Flexibility Act, 1982: Before the Subcomm. on Housing and Dev. of the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 70 (1982) (testimony of Richard T. Pratt, then Chairman FHLBB, at 84).

with FHLBB to acquire a failing thrift.

In December, 1982, FHLBB solicited acquisition proposals from private investors for North Mississippi Savings and Loan Association ("Old North"), which was an insolvent state chartered stock association. Security Savings, among others, submitted a proposal for an FSLIC-assisted acquisition of Old North. None of these proposals were ultimately accepted and in April, 1983, FSLIC was appointed as receiver for New North Mississippi Savings and Loan Association ("New North").

In December, 1983, a second attempt was made by FHLBB to locate a purchaser of New North. Security Savings was contacted by FHLBB and invited to again submit a proposal. FHLBB sent Security Savings a bid package which included instructions and components intrinsic to all bid proposals. Throughout the documentation of this transaction, FSLIC and FHLBB assured Security Savings, either explicitly or implicitly, that supervisory goodwill would be counted as regulatory net worth and this was a fundamental element in the transaction. The negotiations between Security Savings and FHLBB were conducted over a several month period and focused upon the critical terms of the acquisition, including the cash assistance provided by the government and the length of the amortization period for the goodwill.

The agreement that was finally negotiated between FHLBB and Security Savings was embodied in a resolution of FHLBB and in various ancillary documents. According to the FHLBB analysis prepared by FHLBB's staff at the time, *Security Savings's acquisition of New North saved FSLIC approximately $15 to $16 million dollars over the cost of liquidation*. This savings was the direct result of the willingness of Security Savings to assume liabilities in excess of the value of the identifiable

assets of New North. That willingness was dependent upon the essential premise of the transaction that Security Savings would account for the excess acquisition cost, in excess of identifiable assets -- the goodwill -- as an asset.

In granting Security Savings a permanent injunction, the district court found that both the documented evidence and testimony of the parties "demonstrates quite clearly that the inclusion of goodwill was the basic premise of the transaction," 761 F. Supp. at 1283, and that Security Savings was "contractually entitled to treat supervisory goodwill generated by the New North transaction as an asset." Id. at 1281.

Indeed, it is clear that the transaction was only possible based upon the inclusion of goodwill as an asset. As Security Savings' President, Mr. Bailey, testified, "Security would have been insolvent on the day of the transaction without the goodwill being established and being recognized from the auditors and the regulators as an asset. It would have been insolvent on that day." Id. at 1283. The State Commissioner of Savings of the State of Mississippi testified that he could not have approved the transaction had he known that the OTS would later take the position that Security Savings could not count the goodwill, since that would have placed Security Savings in an impaired condition which would have precipitated actions to place Security Savings into receivership. Id. Thus, the district court concluded "that all the parties considered the treatment of goodwill as an express term of the transaction which would endure regardless of any future interpretations or modifications of GAAP in the area." Id., *citing*, *Sterling Sav. Ass'n v. Ryan*, 751 F. Supp. 871 (E.D. Wash. 1990).

The conclusion of the district court in Security Savings's case is consistent with the findings of most of the district courts which have considered these issues. In

general, the majority of the district courts have determined that the assurances provided by FHLBB and FSLIC in these assisted transactions constituted binding contractual agreements which entitled the institutions to utilize a specific accounting method with respect to its capital computation. See e.g., Winstar Corp. v. United States, 21 Cl. Ct. 112, 115 (1990) (The evidence "leads this court to the firm conclusion that the government expressly intended to contract for the particular treatment of goodwill at issue in this case, notwithstanding changes in GAAP or in the statutory scheme."); Sterling Sav. Ass'n v. Ryan, 751 F. Supp. 871, 875 (E.D. Wash.), *appeal docketed*, No. 91-35101 (9th Cir. Dec. 27, 1990) ("[T]he court finds both the existence of a contractual relationship and the lack of a specific and unequivocal intent on the part of Congress to effect a taking . . . ."); Far West Fed. Sav. Bank, S.B. v. Director, Office of Thrift Supervision, 738 F. Supp. 1564 (D. Or.), *appeal docketed*, No. 90-35752 (9th Cir. Sept. 19, 1990); Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision, No. 2-90-166, slip op. (E.D. Tenn. July 16, 1990) (Forbearance agreements are binding contracts), *rev'd on other grounds*, 927 F.2d 1332 (6th Cir. 1991); Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision, 742 F. Supp. 1159, 1162 (M.D. Ga. 1990) (Forbearance agreement is likely a contract), *rev'd on other grounds*, 928 F.2d 994 (11th Cir. 1991); Security Fed. Sav. Bank v. Director, Office of Thrift Supervision, 747 F. Supp. 656, 658 (N.D. Fla. 1990) ("The evidence in this case strongly indicates to me that Security Federal bargained for, and received, a promise from the government that its unamortized deferred loan losses would be treated as a component of its regulatory capital for a period of approximately 215 months. In exchange for this promise, the directors invested $3.6 million. . . . The plaintiffs are correct that the 1987 conversion agreement bears all of the indicia of a contractual agreement. . . ."); Hansen Sav.

Bank v. Office of Thrift Supervision, 758 F. Supp. 240, 246 (D. N.J. 1991) ("The plaintiffs were willing to assume the $40,000,000 deficit as supervisory goodwill in the merged institution . . . if the government agreed to forbear from enforcing its capital standard regulations for a period of time. . . . This permitted the government to use its limited funds to facilitate other supervisory mergers."); Carteret Sav. Bank, FA v. Office of Thrift Supervision, No. 91-661, slip op. at 25 (D.N.J. April 25, 1991) ("Review of these various provisions, as well as a reading of the entire documents together, shows that the parties intended the entire agreement to include the terms relating to purchase method accounting in the forbearance letter and the resolution"), *appeal docketed*, No. 91-5290 (3d Cir. Apr. 23, 1991).

II. THE QUESTION OF WHAT IMPACT, IF ANY, FIRREA HAS UPON THESE CONTRACTS NEEDS AN IMMEDIATE, FINAL ANSWER

In response to the continuing crisis in the thrift industry, the Bush administration enacted FIRREA, which, among other things, established a new insurance fund for thrifts and made major structural changes in the regulation of the thrift industry. Included in these changes was the creation of the Office of Thrift Supervision (the "OTS"), as a successor to FHLBB to regulate and supervise all federally insured savings associations. Security Savings, as well as the other institutions engaged in similar litigation, contend that in enacting FIRREA, Congress made clear that the legislation would not impair the rights and obligations created by agreements entered into with FHLBB and FSLIC under the previous statutory scheme. Notwithstanding this clear intent, the position taken by the OTS has been to require

absolute compliance with the heightened standard of FIRREA, without exception and without regard to the previously negotiated agreements.

The single issue upon which each of these cases turns is the proper construction of those provisions of FIRREA. More specifically, whether FIRREA preserves the otherwise binding contractual agreements entered into by FHLBB and FSLIC as inducements to the healthy institutions and investor groups to take over the failing and insolvent thrifts. Thus far, at least seven of the district courts which have ruled on the issue have agreed with the institutions that FIRREA does not impair these prior obligations of the agencies and the corollary rights of the institutions. Far West Fed. Bank, S.B. v. Director, Office of Thrift Supervision, 738 F. Supp. at 1570; Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 761 F. Supp. at 1277; Sterling Sav. Ass'n v. Ryan, 751 F. Supp. at 880; Carteret Sav. Bank, FA v. Office of Thrift Supervision, No. 91-661, slip op. at 38; Hansen Sav. Bank v. Office of Thrift Supervision, 758 F. Supp. at 246. Two Courts of Appeal however have come to precisely the opposite conclusion. Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision, 927 F.2d 1332 (6th Cir. 1991); Guaranty Fin. Serv., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991).

For the most part, the success of these challenges will be determinative of whether these institutions remain viable and independent, or whether they succumb to seizure by the OTS and become yet another drain upon the insurance funds and the taxpayers. The cases will continue to march through the courts, with uncertain

results. What is absolutely certain, however, is that until the United States Supreme Court considers this important issue and renders its decision, the viability and independence of otherwise healthy and sound institutions remains in the balance.

CONCLUSION

For the foregoing reasons, Security Savings respectfully urges this Court to grant the Petition for a Writ of Certiorari to the Sixth Circuit.

Respectfully submitted,

Of Counsel:
Alan W. Perry
FORMAN, PERRY,
WATKINS & KRUTZ
Twelfth Floor
One Jackson Plaza
188 East Capitol St.
P.O. Box 22608
Jackson, MS 39225-2608
(601) 969-6011

William C. Humphreys, Jr.
Counsel of Record
Benjamin F. Johnson III
Mary C. Gill
ALSTON & BIRD
One Atlantic Center
1201 W. Peachtree St.
Atlanta, GA 30309-3424
(404) 881-7000

Attorneys for Amicus Curiae
Security Savings and
Loan Association

(4)

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v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF SECOR BANK, FEDERAL SAVINGS BANK, AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

EDWARD M. SELFE
201 Office Park Drive
Birmingham, Alabama 35202-2087
(205) 877-0410
Counsel of Record for Secor Bank, Federal Savings Bank

August 5, 1991

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Subtitle D of Title I of H.R. 6, Federal Deposit Insurance Corporation Improvement Act of 1991, as reported on June 28, 1991 by House Banking Committee 6

MISCELLANEOUS:

Thrift Bulletin 38-2a dated May 24, 1991, issued by Office of Thrift Supervision 4

Crovitz, "With Lawsuits Like These, the Thrift Crisis Could Be Forever", Wall Street Journal (June 5, 1991 at p. A13) 8

BNA's Banking Report, Vol. 56, No. 24, p. 1142 (June 17, 1991) 8

IN THE

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OCTOBER TERM, 1991

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BRIEF OF SECOR BANK, FEDERAL SAVINGS BANK, AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF SECOR BANK AS AMICUS CURIAE *

A. Posture of the Case

Petitioners seek review of a judgment of the United States Court of Appeals for the Sixth Circuit that reversed a decision of the United States District Court for the Eastern District of Tennessee. The district court, finding that petitioners entered into a valid and binding contract with the government, and finding further that

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* In accordance with Rule 37.2 of the Rules of the United States Supreme Court, Secor Bank has obtained the written consent of all parties to file a brief in support of Franklin Federal's petition for certiorari. These written consents have been filed with the clerk of this Court.

Congress expressly preserved the contract in FIRREA, enjoined the respondent government agencies from taking any action inconsistent with their obligations under the contract. The Sixth Circuit reversed, concluding that, if petitioners had a contract with the government, FIRREA abrogated it.

B. Posture of Secor Bank, as Amicus Curiae

Secor Bank is a publicly held federal savings bank (3000 stockholders) organized under the laws of the United States with its principal office located in Birmingham, Alabama. Its stock is traded on NASDAQ. It has 60 full service branches located in Alabama, Louisiana and Florida. Prior to August 9, 1989, FHLBB and FSLIC were the regulators of Secor Bank. After such date, the Office of Thrift Supervision (OTS) became the primary regulator of Secor Bank, and the Federal Deposit Insurance Corporation (FDIC) became the secondary regulator of Secor Bank. As of June 30, 1991, Secor Bank had total assets of 2.1 billion dollars and stockholders' equity of 122 million dollars (including preferred stock) based upon generally accepted accounting principles.

In December, 1987, Secor Bank acquired First Financial Bank, FSB, New Orleans, Louisiana ("First Financial") and First Federal Savings Bank, Slidell, Louisiana ("Slidell") in supervisory mergers. These institutions were insolvent, federally chartered savings associations insured by FSLIC. In connection with these supervisory mergers, the FHLBB authorized FSLIC to provide financial assistance and indemnifications to Secor Bank, including contractual provisions for regulatory treatment of capital contributions made by FSLIC. FHLBB approved such mergers only if the cost of the merger was less than the cost of liquidating the insolvent thrift.

The financial assistance and indemnifications provided by FSLIC included the contributions of (i) $57,085.00 in

cash through the purchase of preferred stock, (ii) a $94,689,000 interest bearing note and (iii) indemnification with respect to anticipated losses on acquired assets. The assistance agreement specifically provides that FSLIC and FHLBB agreed to treat the capital contributions by FSLIC as regulatory capital. In accordance with that contract, Secor Bank has filed its reports with OTS showing these capital contributions as regulatory capital. These FSLIC capital contributions are also referred to as "qualifying supervisory goodwill" for purposes of regulatory capital. 12 CFR Section 567.1(w).

On May 24, 1991, OTS issued Thrift Bulletin 38-2a stating that contracts which permit the use of supervisory goodwill for regulatory capital purposes are not to be followed in determining a savings association's regulatory capital. OTS stated that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Public Law No. 101-73, 103 STAT. 183, enacted on August 9, 1989, which required the phase-out of supervisory goodwill as regulatory capital over a five year period ending December 31, 194, applied to savings associations with contracts such as that held by Secor Bank.

If the Supreme Court determines that FIRREA did not abrogate these contracts, Secor Bank currently will meet its fully phased in regulatory capital requirements. If the Supreme Court does not so hold, Secor Bank will not meet the fully phased in regulatory capital requirements at this time, and may not be able to meet its minimum regulatory capital requirements without a very severe reduction in assets to the substantial detriment of the public stockholders of Secor Bank. Therefore, Secor Bank desires to urge the Supreme Court to hold that FIRREA did not abrogate contracts made by FHLBB and FSLIC in connection with supervisory mergers.

As of June 30, 1991, Secor Bank had common stockholders' equity determined in accordance with generally

accepted accounting principles of $68,000,000 which was owned by more than three thousand stockholders. It has had profitable operations in four of the last five years, and had highly profitable operations for the last nine months. FHLBB and FSLIC obtained what they sought, the merger of two insolvent thrifts into a profitable institution at a substantial savings to FSLIC.

If the contract made by FHLBB and FSLIC with Secor Bank is not enforced, the public stockholders of Secor may be severely damaged. Any litigation by Secor Bank to enforce its contract will be affected by the decision of the Supreme Court in this litigation. In both cases, a paramount question will be whether contracts concerning supervisory goodwill executed by FHLBB and FSLIC in connection with supervisory mergers are abrogated by FIRREA. We wish to add our arguments to those of Franklin Federal in urging the Supreme Court to grant a writ of certiorari to the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I. AN EARLY DECISION BY THIS COURT WILL SUBSTANTIALLY REDUCE EXISTING LITIGATION AND AVOID EXTENSIVE FUTURE LITIGATION IN THE FEDERAL DISTRICT COURTS

Secor Bank fully supports the reasons for granting the writ stated by the petitioners. In addition, Secor Bank desires to bring to the Court's attention the enormous administrative burden and litigation expenses being placed upon savings associations and OTS and FDIC by the erroneous OTS determination that FIRREA eliminates contracts providing for the treatment of supervisory goodwill as regulatory capital. On May 24, 1991, OTS issued Thrift Bulletin 38-2a which stated as follows:

> "The Office of Thrift Supervision is applying the new capital standards to all savings associations, including those associations that have been operating under previously granted capital and accounting forbear-

ances. Section 5(t) of HOLA as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRRHEA) eliminates these forbearances. All savings associations presently operating with these forbearances, therefore, should eliminate them in determining whether they comply with the new minimum regulatory capital standards. (Any FSLIC capital contributions that resulted in the creation of goodwill will be subject to the requirements for goodwill established in the capital regulation.)

"If the association determines that it will fail its minimum regulatory capital requirements upon the elimination of capital and accounting forbearances, it must submit a capital plan to its Regional Director in accordance with the regulatory capital regulation and Thrift Bulletin 36a.

"A capital plan will not be acceptable if it includes the continuation of previously granted capital and accounting forbearances. Capital plans already submitted that propose to continue previous capital and accounting forbearances will either be disapproved, returned for revision and resubmittal, or conditionally approved with the requested forbearance denied."

We believe there are many savings associations operating in a safe and sound manner which have forbearance agreements or contracts for the treatment of supervisory goodwill as regulatory capital. If these contracts have not been abrogated by FIRREA, these savings associations will meet their minimum regulatory capital requirements and will not be obligated to submit capital plans to OTS because of a lack of regulatory capital; and those savings associations which do submit capital plans to OTS which include the continuation of supervisory goodwill for regulatory capital purposes pursuant to contracts entered into by FHLBB and FSLIC will not have their capital plans rejected by OTS for that reason.

The preparation and submission of capital plans to the OTS for savings associations with contracts for regula-

tory treatment of supervisory goodwill are highly dependent upon the correct interpretation of Section 401(g) of FIRREA. An early decision by this Court concerning the status of contracts for the regulatory treatment of supervisory goodwill under FIRREA will greatly facilitate the preparation and submission of capital plans to OTS by hundreds of associations, and will reduce substantially the amount of future litigation involving such contracts.

On June 28, 1991, the House Banking Committee of the U.S. Congress approved legislation [1] providing for early intervention and receivership or conservatorship of a savings association or a bank if its tier 1 capital (primarily common stock equity) for regulatory purposes is less than two percent of total assets. If contracts for regulatory treatment of supervisory goodwill have not been abrogated by FIRREA, savings associations having such contracts will not be subject to early intervention based upon disregarding such contracts. Again, an early decision by this Court will foreclose extensive future litigation arising out of early intervention based upon disregarding contracts for supervisory goodwill.

In addition to the thirty-four cases now pending in the federal courts involving contracts for regulatory treatment of supervisory goodwill, many more cases will be filed as savings associations are compelled by regulatory action to seek enforcement of their contracts in federal district courts. If FIRREA abrogated such contracts, as the majority opinion of the Sixth Circuit held in this case, savings institutions have a claim for breach of contract which may be pursued in the United States Claims Court.[2]

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[1] Subtitle D of Title I of H.R. 6, Federal Deposit Insurance Corporation Improvement Act of 1931, as reported on June 28, 1991 by House Banking Committee.

[2] *Winstar Corporation and United Federal Savings Bank v. United States*, No. 90-8C, United States Claims Court, 21 Cl. Ct. 112, 59 U.S.L.W. 2106 (July 27, 1990); *Northeast Savings, F.A. v. Director, Office of Thrift Supervision, et al.*, No. 89-3288 (JHG), United States District Court, District of Columbia (July 16, 1991).

This could result in billions of dollars being paid out by the U.S. Treasury to savings institutions having such contracts.

On the other hand, a decision by this Court that FIRREA did not abrogate such contracts will resolve substantially all disputes over such contracts. The savings institutions having contracts for regulatory treatment of supervisory goodwill want OTS to comply with these contracts rather than pay damages for breach of contract. This is clearly evidenced by the fact that virtually all the litigation on this matter is taking place in the federal district courts rather than in the Claims Court.

In view of the 34 cases now pending in the district courts and the additional cases that will be filed by savings institutions having such contracts, the damages that will have to be paid by FDIC may be in the billions of dollars if FIRREA is held to abrogate such contracts. The FDIC is currently seeking approval from Congress for billions of dollars to be expended by the FDIC and the RTC in resolving insolvent savings associations. Such damages will be in addition to the funds currently being sought by FDIC.

An early decision by this Court to the effect that FIRREA did not abrogate such contracts would relieve FDIC from the risk of large losses arising from claims for breach of contracts. The longer the resolution of this litigation over such contracts is delayed, the greater the costs of this litigation and the administrative burdens on OTS, FDIC and the thrift industry.

II. AN EARLY DECISION BY THIS COURT UPHOLDING CONTRACTS PROVIDING FOR REGULATORY TREATMENT OF CAPITAL WILL ENCOURAGE PRIVATE INVESTORS TO ASSIST IN RECOVERY OF FINANCIAL INSTITUTIONS

FDIC and the Resolution Trust Corporation ("RTC") as well as OTS want private investors to invest equity capital in troubled financial institutions. *E.g.*, In the

July 5, 1991 issue of the Wall Street Journal, it is reported that Southeast Banking Corporation, a 12 billion dollar bank holding company is seeking financial assistance from federal regulatory agencies. At a press conference on June 12, 1991, Timothy Ryan, Director of OTS, announced that OTS wanted to induce private investment in savings institutions needing added capital by matching such investment with government assistance. See BNA's Banking Report, Vol. 56, No. 24 at p. 1142 (June 17, 1991). Private investment will be very difficult to accomplish so long as there is investor concern that contracts made with these agencies may not be enforceable.

An early decision by this Court that FIRREA did not abrogate contracts for regulatory capital requirements will encourage private investors to assist in the recovery of financial institutions. It has been suggested that the thrift crisis will last forever if lawsuits such as this are not quickly resolved. *Crovitz*, "With Lawsuits Like These, the Thrift Crisis Could Be Forever," Wall Street Journal (June 5, 1991 at p. A13).

CONCLUSION

For the foregoing reasons and the reasons stated by petitioners, we respectfully urge that the writ be granted.

Respectfully submitted,

EDWARD M. SELFE
201 Office Park Drive
Birmingham, Alabama 35202-2087
(205) 877-0410
Counsel of Record for Secor Bank, Federal Savings Bank

August 5, 1991

APPENDIX

APPENDIX

Office of Thrift Supervision

THRIFT BULLETIN

Handbook: Thrift Activities — Section:320
Subject: Capital Adequacy — TB 38-2a

May 24, 1991

CAPITAL ADEQUACY: GUIDANCE ON THE STATUS OF CAPITAL AND ACCOUNTING FORBEARANCES AND CAPITAL INSTRUMENTS HELD BY A DEPOSIT INSURANCE FUND

Summary: This Bulletin informs all savings associations that have been operating under capital or accounting forbearances that Section 5(t) of the Home Owners' Loan ct ("HOLA") eliminates such forbearances. Accordingly, these forbearances should be eliminated in determining whether an association complies with the new capital regulation. All associations that do not comply with the new capital regulation must submit a capital plan. This Bulletin also clarifies the treatment of capital instruments held by a deposit insurance fund or related entity (such as the Resolution Trust Corporation (RTC) and the FSLIC Resolution Fund (FRF)). Thrift Bulletin 38-2 (TB 38-2), dated January 9, 1990, is rescinded with the issuance of this Bulletin. The differences between TB 38-2 and TB 38-2a are in the treatment of capital instruments held by a deposit insurance fund or related entity.

For Further Information Contact:

The Regional Office in which you are located or the Policy Division of OTS, Washington, D.C.

Thrift Bulletin 38-2a

Introduction

Questions have been raised regarding the status of previously granted forbearances and waivers as well as the treatment of FSLIC-owned warrants and other capital instruments. This Bulletin provides guidance to savings associations on these matters.

Capital Compliance

The Office of Thrift Supervision is applying the new capital standards to all savings associations, including those associations that have been operating under previously granted capital and accounting forbearances. Section 5(t) of HOLA as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) eliminates these forbearances. All savings associations presently operating with these forbearances, therefore, should eliminate them in determining whether they comply with the new minimum regulatory capital standards. (Any FSLIC capital contributions that resulted in the creation of goodwill will be subject to the requirements for goodwill established in the capital regulation.)

If the association determines that it will fail its minimum regulatory capital requirements upon the elimination of capital and accounting forbearances, it must submit a capital plan to its Regional Director in accordance with the regulatory capital regulation and Thrift Bulletin 36a.

A capital plan will not be acceptable if it includes the continuation of previously granted capital and accounting

forbearances. Capital plans already submitted that propose to continue previous capital and accounting forbearances will either be disapproved, returned for revision and resubmittal, or conditionally approved with the requested forbearance denied.

Capital Instruments Held by a Deposit Insurance Fund or Related Entity

Capital instruments owned by a party with a financial obligation to havings association will be treated in accordance with Generally Accepted Accounting Principles (GAAP), unless such instruments are defined by law to be capital (e.g., net worth certificates) or unless the FDIC Board of Directors explicitly requests that they not be subject to offset and the OTS Director approves such requests. For example, under 12 CFR 567, for the purpose of the inclusion in capital of instruments owned by the FSLIC/FRF, the FDIC, or the RTC, the Office will rely on the presentation standards established under GAAP. FSLIC/FRF, FDIC, or RTC holdings of capital instruments (including, but not limited to, warrants, preferred stock and subordinated debentures) will be required to be offset by any receivables (on the asset side of the balance sheet) from, respectively, the FSLIC/FRF, the FDIC, or the RTC for the purpose of calculating the amount of such holdings to be included in capital unless one of the exceptions noted above applies. The amount of such offset is limited to the amount of the FSLIC/FRF, FDIC, or RTC capital instrument.

When there is no offsetting requirement, the value of warrants (to the extent that such warrants, when exercised, would qualify as capital) and other capital instruments that would qualify as tangible and core capital may be counted as such unless the holder of the warrants and other instruments is a federal deposit insurance fund or related entity. If the holder of the capital instruments is a federal deposit insurance fund or related entity, then

they must be classified as supplementary capital, unless the FDIC Board of Directors explicitly requests that they be counted as tangible and core capital and the OTS Director approves such request.

/s/ Jonathan L. Fiechter
JONATHAN L. FIECHTER
Deputy Director for Washington Operations

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No. 90-1881

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Supreme Court of the United States

OCTOBER TERM, 1991

FRANKLIN FEDERAL SAVINGS BANK, *et al.*,
Petitioners,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY MEMORANDUM TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. MICHAEL MCGARRY III
Counsel of Record
THOMAS M. BUCHANAN
ERIC W. BLOOM
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Counsel for Petitioners

August 15, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1881

FRANKLIN FEDERAL SAVINGS BANK, *et al.*,
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v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY MEMORANDUM TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARGUMENT

1. The government does not disagree with petitioners' conclusion that the issue presented before this Court is one of national importance that is being litigated repeatedly throughout the federal court system. Indeed, four courts of appeals (and dozens of district courts) currently are addressing controversies in which the respective courts must decide whether the Financial Institu-

tions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, abrogates or preserves contracts entered into by the Federal Home Loan Bank Board ("FHLBB") or the Federal Savings and Loan Insurance Corporation ("FSLIC"), the predecessor agencies to the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"), respectively.[1] The importance to which the government attaches to the issue has been underscored by its decision to have the Solicitor General make the argument next month in the United States Court of Appeals for the Third Circuit in *Carteret Savings Bank v. Office of Thrift Supervision*, No. 91-5290 (3d Cir. filed March 25, 1991).[2]

2. Respondents concede that Section 401(g) preserves contracts entered into by either the FHLBB or the FSLIC notwithstanding the abolition of these agencies in the FIRREA. Resp. Br. at 8. The government argues, however, that petitioners' contract is not abrogated by

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[1] *See Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, No. 90-35752 (9th Cir. filed Sept. 19, 1990); *Sterling Savings Association v. Ryan, Director, Office of Thrift Supervision*, No. 91-35101 (9th Cir. filed Dec. 27, 1990); *Carteret Savings Bank v. Office of Thrift Supervision*, No. 91-5290 (3d Cir. filed March 25, 1991); *Security Savings & Loan Association, et al. v. Director, Office of Thrift Supervision*, No. 91-1570 (5th Cir. filed May 24, 1991); *Northeast Savings, F.A. v. Director, Office of Thrift Supervision*, No. 91-5226 (D.C. Cir. filed July 17, 1997); and *Transohio Savings Bank, et al. v. Director, Office of Thrift Supervision, et al.*, Civil Action Number not yet assigned (D.C. Cir. filed Aug. 8, 1991).

[2] While the government suggests that this Court should wait to review the issue until there is a conflict in the court of appeals, *see* Brief for the Respondents in Opposition ("Resp. Br.") at 8, delay in the resolution of the issue likely will lead to the seizure and liquidation of a number of healthy and viable savings and loan associations (including petitioner Franklin Federal Savings Bank) on a basis that this Court eventually may hold unlawful. In the interim, the government and thrifts alike will continue to expend enormous resources to litigate the instant issue.

virtue of the abolition of these agencies, but rather, by virtue of Section 301 of the FIRREA. The government's strained interpretation of the FIRREA implies that Congress, having made the determination in Section 401(g) to honor the government's commitments notwithstanding the abolition of the FHLBB and FSLIC, decided contemporaneously to abrogate the identical contracts in Section 301. The court of appeals erred for adopting the agencies' reading of the FIRREA, especially in light of the total absence of any language in the statute that explicitly terminates petitioners' contract rights.

3. The government suggests that the language of Section 401(g) should not be given its full effect because it is a "ministerial savings provision." *See* Resp. Br. at 9. But the government's logic would frustrate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). In any event, savings provisions that "are calculated to prevent hardship by saving accrued rights . . . from the operation of a new rule" are to be broadly construed. 2A N. Singer, *Sutherland Statutory Construction*, ¶ 47.12 at 149 (Sands 4th ed. 1984). *See also De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389-90 (1953).[3]

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[3] The government gratuitously opines: "Congress recognized that one cause of the great losses suffered by taxpayers was past reliance by thrifts on intangible assets of illusory value." Resp. Br. at 8. But it was the offer of supervisory goodwill that induced the seven investors that comprise petitioner Franklin Financial Group, Inc. to acquire the institution and infuse $5 million of their own capital into the bank. Since the acquisition, the institution has earned approximately $1 million a year. In this context, it is apparent that the offer and use of supervisory goodwill, far from causing any losses, has "inured to the benefit of the F.D.I.C. [Federal Deposit Insurance Corporation] and the American public to a total sum of over seven million dollars." Order Granting Permanent Injunction ("Order") at ¶ 7, No. CIV-2-90-166 (E.D.Tenn. 1990) (Pet. App.

4. Respondents argue that Section 401(h) rather than Section 401(g) accords OTS the authority to "modif[y], terminate[], set aside, or supersede[]" petitioners' contract rights. Resp. Br. at 9. But the section to which the government refers only pertains to "orders, resolutions, determinations, and regulations"—all of which are *unilaterally* issued and may be *unilaterally* withdrawn. By contrast, Section 401(g) specifically pertains to "dut[ies]," and "obligation[s]"—which, by their nature, are binding on the parties and which may not be unilaterally withdrawn. Because petitioners' appeal assumes the existence of a contractual agreement, *see infra* at 5, Section 401(h) is irrelevant to this Court's analysis.

5. While Section 301 of the FIRREA appears to limit a savings association's use of supervisory goodwill for regulatory capital purposes, the section is silent as to whether it is intended to terminate contractual rights that are inconsistent with its provisions. It is a fundamental principle of statutory construction, however, that Congress, when it intends to upset settled expectations, must express its intention in *unmistakable* language. *See* cases cited in Petition at 15-17.[4] The government accepts this principle but argues that (1) petitioners never entered into a contractual relationship with respondents' predecessors-in-interest, and (2) if petitioners did enter into a valid and binding contract, "such contracts are subject to subsequent legislation and are to be construed so as to avoid foreclosing the exercise of sovereign immunity." Resp. Br. at 10.

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at 30a). Further, it was the respondents' predecessors, not petitioners, that created the concept and offered the use of goodwill as an asset to private investors to lure private capital into an industry in desperate need of such capital.

[4] *See also Bell Telephone Co. of Pa. v. Federal Communications Commission*, 503 F.2d 1250, 1280 (3d Cir. 1984), *cert. denied*, 422 U.S. 1026 (1975) ("The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts").

The government's characterization of petitioners' Forbearance Letter as a mere "regulatory decision" is both incorrect and irrelevant. The government ignores the district court's conclusion that the Forbearance Letter "was an integral part of the entire agreement and was for the benetfi of all parties in order to recapitalize the failing institution . . . ." Order at ¶ 4 (Pet. App. at 29). Indeed, the seven investors that comprise the holding company "would not have invested five million dollars into this institution absent the forbearance agreement, inasmuch as Franklin Federal would have been insolvent and subject to closure at its inception . . . ." *Id.* at ¶ 5 (Pet. App. at 29a).[5]

Moreover, the status of petitioners' contract is not even an issue in this appeal because the court of appeals never addressed the question. It instead assumed, for purposes of its analysis, that the Forbearance Letter was part of a contract. The issue before this Court, then, is *not* whether the Forbearance Letter was part of a contract, but rather, whether the FIRREA abrogates petitioners' contract, assuming one exists. If this Court answers in the negative, the court of appeals will have its opportunity to address the district court's factual findings.[6]

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[5] *See also Charter Federal Savings Bank v. Director, Office of Thrift Supervision et al.*, No. 91-0012-A, slip op. (W.D. Va. Aug. 6, 1991) ("When a party wants to engage in conduct that is subject to an agency's regulatory authority, and the agency gives permission to engage in the conduct for a specified period, the party is justified in understanding that the agency is committed to allowing the conduct for the specified period. If the agency has received consideration for its permission, a contract is formed.").

[6] Respondents further confuse the matter by noting that the Voting and Disposition Rights/Dividend Agreement indicates that regulatory changes "may increase or decrease [Franklin Federal's] obligation under this Agreement." *See* Resp. Br. at 2, 10-11. The district court, however, had to reconcile this language with language contained in the Forbearance letter, which expressly waives the FSLIC's and the FHLBB's right to take any enforcement action

The government's backup argument—that contracts must be construed to avoid impinging on the exercise of sovereign immunity—has no application here. Even under the contract, OTS and FDIC may, and do, extensively regulate Franklin Federal. In any event, petitioners assume for purposes here that Congress, if it so chooses, *could* abrogate petitioners' contract. It is petitioners' position, however, that Congress chose not to exercise that authority.

The court of appeals, far from requiring explicit statutory language abrogating petitioners' contract rights, merely "infer[red]" that Congress intended to abrogate the contract and "effect a taking." *See* Pet. App. at 18a. As most of the district courts have recognized, the court of appeals' inference is unwarranted.

> That Congress would accomplish such a result by nothing more than mere innuendo, its intent disguised by a questionable inference, makes [abrogation] all the more doubtful . . . . Statutory authorization to effect a taking, which of course would be the case here, must be specific, either in terms of an express remedy for the act or explicit permission to perform the act . . . .[I]n this case there is neither.

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based on Franklin Federal's treatment of supervisory goodwill. The letter provides that

> [o]*ther than* actions to enforce the regulatory requirements *waived* in accordance with paragraph 1 [authorizing amortization of goodwill] and the statutory provisions authorizing imposition of the *waived* requirement, . . .

the FHLBB and FSLIC retain all of their statutory rights and powers. Forbearance Letter at 1. Thus, while both parties understood that Franklin Federal generally would be subject to changes in the regulations, the parties likewise understood that Franklin Federal's right to treat supervisory goodwill as an asset stood apart, that this was instead such a material term of the contract that respondents were without the right to revoke this term. Moreover, as noted above, the construction of the contract is not currently before this Court—only whether the contract, as interpreted by petitioners and the district court—has been abrogated by the FIRREA.

Sterling Savings Association v. Ryan, Director, Office of Thrift Supervision, 751 F. Supp. 871, 880 (E.D. Wash. 1990), *appeal docketed*, No. 91-35101 (9th Cir. filed Dec. 27, 1990). To be sure, this Court has repeatedly stated that statutes are to be construed "to avoid raising doubts of its constitutionality." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981). *Accord, United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982).

In short, if Congress wanted to abrogate petitioners' contract rights and effect a taking, it had an affirmative obligation to state so expressly. Its failure to do so leaves the courts no choice but to assume that petitioners' contract remains valid, binding and enforceable on the parties.

Respectfully submitted,

J. MICHAEL MCGARRY III
Counsel of Record
THOMAS M. BUCHANAN
ERIC W. BLOOM
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700
Counsel for Petitioners

August 15, 1991